SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 978 / 129

THE UNITED STATES OF AMERICA

vs.

BOSTON & MAINE RAILROAD

No. 979

OLD COLONY TRUST COMPANY ET AL., EXECUTORS

vs.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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1 In United States Circuit Court of Appeals for the First Circuit

October Term, 1927

No. 2235

UNITED STATES OF AMERICA, DEFENDANT, APELLANT,

v.

BOSTON & MAINE RAILROAD, PLAINTIFF, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, JOHNSON, and MORTON, JJ.

No. 2218

OLD COLONY TRUST COMPANY ET AL., EXECUTORS, PETITIONERS FOR review

v.

COMMISSIONER OF INTERNAL REVENUE

Petition for review of decision of United States Board of Tax Appeals

Before BINGHAM, JOHNSON, AND HALE, JJ.

Question of law certified by the United States Circuit Court of Appeals for the First Circuit to the Supreme Court of the United States May 2, 1928

Statement of facts

The facts in No. 2235 are as follows:

This action is brought by the Boston & Maine Railroad to recover income taxes for the year 1917, claimed to have been erroneously collected. In the District Court the plaintiff recovered a judgment for the full amount of its demand—$3,920.55 and interest.

2

June 30, 1900, the Fitchburg Railroad Company leased all its railroad and property of every description to the Boston & Maine Railroad for the term of ninety-nine years. In the lease the lessee covenanted to pay specified rentals, to maintain and replace the leased properties in manner indicated, to pay all operating expenses, and to pay "all taxes of every description, Federal, State, and municipal, upon the lessor's property, business, indebtedness, income,

franchises, or capital stock, or said rental," and to pay divers other charges. In 1918 an income-tax return, under the provisions of the revenue acts of 1916 and 1917, was filed on behalf of the Fitchburg Railroad Company for the calendar year 1917, upon which taxes amounting to $61,422.06 were assessed. These taxes were paid to the Commissioner of Internal Revenue by the Boston & Maine Railroad pursuant to the term of the lease. The Fitchburg Railroad Company was consolidated with the Boston & Maine Railroad in 1919.

In 1921 the Commissioner of Internal Revenue assessed an additional income tax against the Fitchburg Railroad Company of $3,920.55. In doing this he treated the payment of $61,422.06 made by the Boston & Maine Railroad to the collector of internal revenue as additional taxable income to the Fitchburg Railroad Company to the extent of $65,342.61. This additional tax of $3,920.55 was paid to the collector of internal revenue by the Boston & Maine Railroad in July, 1921.

The claim for refund of this additional tax was duly filed with the Commissioner of Internal Revenue, but was never formally acted upon, and more than six months having elapsed after it was filed, this action was brought for the recovery of the tax so paid.

The facts in No. 2218 are as follows:

This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of
3 William M. Wood, deceased. The Board of Tax Appeals found a deficiency in the Federal income tax of Mr. Wood for the year 1919 of $708,781.93 and for the year 1920 of $350,837.14. The petition for review was duly filed pursuant to sections 1001 and 1002 of the revenue act of 1926 and rule 38 of this court.

William M. Wood was president of American Woolen Company during the years of 1918, 1919, and 1920. In 1918 he received as salary and commissions from the company $978,725, which he included in his Federal income tax return for 1918. In 1919 he received as salary and commissions from the company $548,132.87, which he included in his Federal income tax return for 1919.

August 3, 1916, the American Woolen Company duly adopted the following resolution, which was in effect in 1919 and 1920:

"Voted: That this company pay any and all income taxes, State and Federal, that may hereafter become due and payable upon the salaries of all the officers of the company, including the president, William M. Wood; the comptroller, Parry C. Wiggin; the auditor, George R. Lawton; and the following members of the staff, to wit: Frank H. Carpenter, Edwin L. Heath, Samuel R. Haines, and William M. Lasbury, to the end that said persons and officers shall receive their salaries or other compensation in full without deduction on account of income taxes, State or Federal, which taxes are to be paid out of the treasury of this corporation."

This resolution was amended on March 25, 1918, as follows:

"Voted: That, referring to the vote passed by this board on August 3, 1916, in reference to income taxes, State and Federal, payable upon the salaries or compensation of the officers and certain employees of this company, the method of computing said taxes shall be as follows, viz:

"The difference between what the total amount of his tax would be, including his income from all sources, and the amount of his tax when computed upon his income excluding such compensation or salaries paid by this company."

Pursuant to these resolutions the American Woolen Company paid to the collector of internal revenue Mr. Wood's Federal income and surtaxes due to salary and commissions paid him by the company as follows:

4

Taxes for 1918 paid in 1919	$681,169.88
Taxes for 1919 paid in 1920	351,179.27

The decision of the Board of Tax Appeals here sought to be reviewed was that the income taxes of $681,169.88 and $351,179.27 paid by the American Woolen Company for Mr. Wood were additional income to him for the years 1919 and 1920.

Question certified

In view of the foregoing we desire the instruction of the Supreme Court upon the following question:

Did the payment by the lessee in No. 2235 or by the employer in No. 2218 of the income taxes assessable against the lessor in the first case and the employee in the second constitute additional taxable income to such lessor or to such employee?

We are informed that numerous cases are pending in which this question is involved, and because of this we take this action.

It is now, to wit, May 2, 1928, ordered that the foregoing statement of facts, and question of law arising thereon, together with the fact that this court desires the instruction of the Supreme Court for the proper decision of said question of law, be certified under the seal of this court, and transmitted to the Supreme Court.

By the court:

ARTHUR I. CHARRON, *Clerk.*

5 *Clerk's certificate*

And now, here, the judges of the United States Circuit Court of Appeals for the First Circuit certify that the foregoing is a true copy of an order of court entered on May 2, 1928, in said causes numbered and entitled

No. 2235

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

BOSTON & MAINE RAILROAD, PLAINTIFF, APPELLEE

No. 2218

OLD COLONY TRUST COMPANY ET AL., EXECUTORS, PETITIONERS FOR review

v.

COMMISSIONER OF INTERNAL REVENUE

and that, pursuant to said order, the statement of facts and question of law arising thereon, together with the fact that said Circuit Court of Appeals desires the instruction of the Supreme Court of the United States for the proper decision of said question of law contained in said order, are hereby certified under the seal of said United States Circuit Court of Appeals for transmission to said Supreme Court.

In testimony whereof I hereto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit at Boston, in the First Judicial Circuit, this fourth day of May, A. D. 1928.

[SEAL.] ARTHUR I. CHARRON, *Clerk.*

(Indorsed on cover:) File Nos. 33430, 33431. U. S. Circuit Court of Appeals, First Circuit. Term No. 978. (Certificate.) The United States of America v. Boston & Maine Railroad. Term No. 979. Old Colony Trust Company et al., executors, vs. Commissioner of Internal Revenue. Filed May 9th, 1928. File Nos. 33430, 33431.

U. S. GOVERNMENT PRINTING OFFICE: 1928

In United States Circuit Court of Appeals for the First Circuit

Old Colony Trust Company et al., Executors, Petitioners for Review,

v.

Commissioner of Internal Revenue

Amended Statement of Facts—Filed March 15, 1929

Question of Law Certified by the United States Circuit Court of Appeals for the First Circuit to the Supreme Court of the United States May 2, 1928

March 14, 1929.

At the suggestion of counsel and in conformity with the order of the Supreme Court of the United States, dated February 18, 1929, the statement of facts with respect to Number 2218, contained in the certificate of this Court, dated May 2, 1928, is amended to read as follows:

This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, the Commissioner of Internal Revenue notified Mr. Wood by registered mail of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The amount of this deficiency was revised by the Commissioner's letter of August 18, 1925. On August 22, 1925, an appeal was taken to the Board of Tax Appeals. In response to an order to make petition more definite and certain, an amended petition was filed October 27, 1925. The hearing before the Board of Tax Appeals was held April 11, 1927, and the decision of the Board of Tax Appeals was rendered November 12, 1927. The Board of Tax Appeals approved the action of the Commissioner and found a deficiency in the federal income tax of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review in this Court of the decision of the Board of Tax Appeals, pursuant to the Revenue Act of 1926 and Rule 38 of this Court, was perfected December 23, 1927.

William M. Wood was president of American Woolen Company during the years of 1918, 1919, and 1920. In 1918 he received as salary and commissions from the company $978,725, which he included in his Federal income tax return for 1918. In 1919 he received as salary and commissions from the company $548,132.87, which he included in his Federal income tax return for 1919.

August 3, 1916, the American Woolen Company duly adopted the following resolution, which was in effect in 1919 and 1920.

"Voted: That this company pay any and all income taxes, State and Federal, that may hereafter become due and payable upon the salaries of all the officers of the company, including the president, William M. Wood; the comptroller, Parry C. Wiggin; the auditor, George R. Lawton; and the following members of the staff, to wit: Frank H. Carpenter, Edwin L. Heath, Samuel R. Haines, and William M. Lasbury, to the end that said persons and officers shall receive their salaries or other compensation in full without deduction on account of income taxes, State or Federal, which taxes are to be paid out of the treasury of this corporation."

This resolution was amended on March 25, 1918, as follows:

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" 'The difference between what the total amount of his tax would be, including his income from all sources, and the amount of his tax when computed upon his income excluding such compensation or salaries paid by this company.' "

Pursuant to these resolutions the American Woolen Company paid to the collector of internal revenue Mr. Wood's Federal income and surtaxes due to salary and commissions paid him by the company as follows:

Taxes for 1918 paid in 1919	$681,169.88
Taxes for 1919 paid in 1920	351,179.27

The decision of the Board of Tax Appeals here sought to be reviewed was that the income taxes of $681,169.88 and $351,179.27 paid by the American Woolen Company for Mr. Wood were additional income to him for the years 1919 and 1920.

By the Court.

Arthur I. Charron, Clerk.

A true copy. Attest: Arthur I. Charron, Clerk. [Seal United States Circuit Court of Appeals, First Circuit.]

[File endorsement omitted.]

Office Supreme Court,
FILED
JAN 8 1929
CHARLES ELMORE CRO
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No. 129.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1928.

UNITED STATES OF AMERICA
v.
BOSTON & MAINE RAILROAD.

On Certificate From the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR THE BOSTON AND MAINE RAILROAD.

JAMES S. Y. IVINS,
Counsel for Boston & Maine Railroad.

Of Counsel:
THORNTON ALEXANDER,
KINGMAN BREWSTER,
E. S. KOCHERSPERGER,
O. R. FOLSOM-JONES,
JOSEPH D. BRADY.

January, 1929.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 129

UNITED STATES OF AMERICA.

v.

BOSTON & MAINE RAILROAD.

On Certificate From the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR THE BOSTON & MAINE RAILROAD.

OPINION BELOW.

The opinion of the District Court for the District of Massachusetts, rendered in favor of the taxpayer, is reported in 23 Fed. (2d) 343. For the convenience of the court this opinion is printed in full as Appendix B to this brief, at page 64.

JURISDICTION.

This case is here on certificate from the Circuit Court of Appeals for the First Circuit, filed May 9, 1928.

QUESTION PRESENTED.

In the words of the District Court:

"This case was selected from several other similar ones[1] to test the question whether the payment of the Federal income tax under a lease which provided for the payment of all taxes by the lessee subjects the lessor to a further tax on the sum of money so paid."

STATUTES INVOLVED.

The Revenue Act of 1917, section 1206, amended section 10 of the Revenue Act of 1916 to read:

> "Sec. 10. (a) That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, * * * a tax of two per cent upon such income; * * *"

The Revenue Act of 1917 also made the following provisions:

> "Sec. 4. That in addition to the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation, * * *"
>
> "Sec. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:
>
> "Twenty per centum of the amount of the net

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[1]The reason given by the Circuit Court of Appeals for certifying the question is that numerous cases are pending in which this question is involved.

income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

"Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

"Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

"Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital."

"Sec. 203. That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided—

"(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000; * * *"

"Sec. 12 (a)[2] In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

"First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a con-

[2]As continued from the Revenue Act of 1916.

dition to the continued use or possession of property to which the corporation has not taken title or is not taking title, or in which it has no equity * * *

"Fourth. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) * * *[3]"

STATEMENT OF FACTS.

The facts as certified by the Circuit Court of Appeals (R. 1, 2) are as follows (italics supplied):

"This action is brought by the Boston & Maine Railroad to recover income taxes for the year 1917, claimed to have been erroneously collected. In the District Court the plaintiff recovered a judgment for the full amount of its demand—$3,920.55 and interest.

"*June 30, 1900*, the Fitchburg Railroad Company leased all its railroad and property of every description to the Boston & Maine Railroad for the term of ninety-nine years. In the lease *the lessee covenanted to pay specified rentals*,[4] to maintain and replace the leased properties in manner indicated, to pay all operating expenses, *and* to pay '*all taxes* of every description, Federal, State, and municipal, *upon the lessor's* property, business, indebtedness, *income*, franchises, or capital stock, *or said rental*,' and to pay divers other charges. In 1918 an income tax return, under the provisions of the revenue acts of 1916 and 1917, was filed on behalf of the Fitchburg Railroad Company for the calendar year 1917, upon which taxes amounting to $61,422.06 were assessed. These taxes were paid to the Commissioner of Internal Revenue by the Boston & Maine Railroad pursuant to the

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[3]Words in parentheses new with Revenue Act of 1917.

[4]By paying directly to the stockholders of the lessor specified dividends on their stock—see opinion of District Court at p. 65, below.

term of the lease. The Fitchburg Railroad Company was consolidated with the Boston & Maine Railroad in 1919.

"In 1921 the Commissioner of Internal Revenue assessed an additional income tax against the Fitchburg Railroad Company of $3,920.55. In doing this he treated the payment of $61,422.06[4] made by the Boston & Maine Railroad to the Collector of Internal Revenue as additional taxable income to the Fitchburg Railroad Company to the extent of $65,342.61.[5] This additional tax of $3,920.55 was paid to the Collector of Internal Revenue by the Boston & Maine Railroad in July, 1921.

"The claim for refund of this additional tax was duly filed with the Commissioner of Internal Revenue, but was never formally acted upon, and more than six months having elapsed after it was filed, this action was brought for the recovery of the tax so paid."

THE ISSUE.

The Boston & Maine Railroad[6] contends that when it paid the 1917 income tax on the income of the Fitchburg Railroad Company, such payment of $61,422.06 did not constitute additional taxable income to the Fitchburg of $65,342.61 or any other amount for 1917 or any other year.

The Government contends that such payment did constitute additional income to the Fitchburg, but whether in the sum of $65,342.61 or $61,422.06 and whether for 1917 or 1918 is not clear—for the Gov-

[4]Note that taxes paid were treated as additional income not to the extent of the amount paid but *in excess thereof* by 6.383%.

[6]By reason of the consolidation mentioned in the statement of facts, the Boston & Maine now stands in the place of the Fitchburg (lessor).

ernment in filing a single brief in Nos. 129 and 130 seems to be attempting simultaneously to sustain the position taken by it in the District Court in No. 129 that the tax paid constituted additional taxable income *in excess* of the amount thereof and for the *same* year, and also to sustain the position of the Board of Tax Appeals in No. 130 that the tax paid constituted additional taxable income in *exactly* the amount of the tax paid but for the *next subsequent* year.

Summary of Argument.

The payment of a lessor's income tax, in accordance with the provisions of a lease made prior to the adoption of the Sixteenth Amendment to the Constitution, does not constitute additional taxable income to the lessor.

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VII. The Government Can Not Render its Theory Reasonable by Arbitrarily Departing from it after One Computation (p. 43).

VIII. The Practical View (p. 45).
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Edwards v. *Slocum*, 264 U. S. 61.
Elmer Candy Co. v. *Fauntleroy*, 24 Fed. (2d) 95.
Cliquot Club v. *U. S.* 13 Fed. (2d) 970.
Lash's Products Co. v. *U. S.*, 64 Ct. Cl. 252.
White Rock, etc., Co. v. *Edwards*, 23 Fed. (2d) 539.
Smith Grapejuice Co. v. *U. S.*, 63 Ct. Cl. 140.
Edwards v. *Slocum*, 264 U. S. 1.
Nichols v. *Coolidge*, 274 U. S. 531.

IX. Distinction Between Lawful Avoidance and Illegal Evasion of Taxes (p. 51).
Blackstone's Commentaries II, 339.
U. S. v. *Isham*, 17 Wall. 496.

X. Principles of Construction Applicable (p. 52).
Eisner v. *Macomber*, 252 U. S. 189.
Lynch v. *Hornby*, 247 U. S. 339.

Merchants Loan & Trust Co. v. *Smietanka*, 255 U. S. 509.
United States v. *Supplee-Biddle Co.*, 265 U. S. 189.
Edwards v. *Slocum*, 264 U. S. 61.
Gould v. *Gould*, 245 U. S. 151.
Lynch v. *Alworth-Stephens Co.*, 267 U. S. 364.

ARGUMENT.

I.

Introductory.

It should be noted that the facts in the two cases certified together are essentially different and that the certificate really contains two questions indicated by the disjunctive use of "or."

> "Does the payment by the lessee in No. 2235 [129 here] *or* by the employer in No. 2218 [130 here] of the income taxes, assessable against the lessor in the first case and the employee in the second, constitute additional taxable income to such lessor *or* to such employee." (Italics supplied.)

Because of the distinctions in the facts counsel for the taxpayers are filing separate briefs in the two cases. The principal differences of fact between the two cases are:

(1) The payment by the lessee in No. 129 was pursuant to a lease made in 1900, *long prior to the Sixteenth Amendment* and even to the Corporation Excise Tax Act of 1909, while the payment by the employer in No. 130 was made pursuant to a directors' resolution first adopted in 1916.

(2) The payment in No. 129 was made pursuant to a contract under which the lessee must pay *all* taxes assessed against the lessor—which must include not only the tax on the rental-income but any secondary tax on that tax (if it constitutes additional income) and any tertiary tax on that secondary tax (which must also be income if the first tax be held to be income) and so on *ad infinitum;* while the resolution in No. 130 might be construed not to be a contract but

a gratuity, or might be construed as an assumption by the employer of only the tax on the salary but not also of any tax on the tax.

(3) In No. 129 the lessee was a public service corporation, in No. 130 the employer was not.

It is the purpose of counsel for Boston & Maine Railroad to confine this brief to the situation arising under the facts in No. 129 and the similar cases referred to in the opinion of the District Court for which it was selected as a test case.

Prior to June 30, 1900, the Fitchburg was an operating railroad company. All the revenues from its operations belonged to it. It had to pay all its expenses, including taxes of all kinds, and the balance, if any, was its profit. If it had continued to operate until after the Federal Government began imposing income taxes, it could have treated those taxes as operating expenses for the purposes of making rates[7] and (even though it might not be permitted to deduct those taxes in the computation of net taxable income) it could raise its rates to assure itself a reasonable return upon its investment *after payment of income taxes*. It could have so fixed its rates that it could pay reasonable dividends to its stockholders regardless of taxes. As a simple method of assuring to its stockholders reasonable dividends (subject only to such taxes as might be imposed upon them as income of the stockholders rather than the corporation) it entered into the lease of June 30, 1900, by which the Boston & Maine took over its entire property, undertaking to fulfill all its obligations to the public in the maintenance and operation of the road, and agreed to pay *all operating costs, including all taxes* (on its income

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[7] *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, 399.

as well as its property, franchises, et cetera), and *further* to pay fixed dividends directly to the Fitchburg's stockholders.[8]

The lease was so drawn that the dividends would be paid to the Fitchburg stockholders without diminution for any taxes that might be imposed on the property or income of the corporation. It left them assured of the reasonable dividends they might have expected *regardless of the imposition of Federal income taxes* had the Fitchburg continued to operate its road. For the assurance of such fixed dividends the stockholders forwent the possibility of higher dividends they might have expected had the Fitchburg continued to operate and to prosper.

From the point of view of the Boston & Maine,[9] it became obligated to pay *rental* in the form and to the extent of the dividends, and it also assumed, *as one of the operating expenses but not as rental*,[10] the payment of any taxes which although not then in being might by some future legislative enactment be imposed on the *income* of the lessor. Subsequently, various Federal courts held that dividends paid to stockholders of a lessor road by a lessee constituted taxable income to the lessor,[11] and the Boston & Maine accordingly (without litigating the question) paid to the Collector of Internal Revenue in 1918 a tax of $61,422.06—six per cent on the rental dividends paid to the Fitchburg stockholders in 1917. It paid six

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[8]Quarterly dividends of $1.25 per share on preferred and $.25 per share on common stock outstanding—see opinion of District Court at p. 65, below, or the lease set forth in full in the record before the Circuit Court of Appeals.

[9]And according to the phraseology of the lease.

[10]*Duffy* v. *Central R. R. of N. J.*, 268 U. S. 55.

[11]*Rensselaer & Saratoga R. R. Co.* v. *Irwin*, 249 Fed. 726, and similar cases discussed under point V, below.

per cent on only the amount of those dividends, *because those dividends represented all the net income the Fitchburg could possibly have*—it was entitled to receive nothing itself and its stockholders were entitled to nothing more (and to nothing less) than the dividends.

But then came the Treasury Department and, in the words of the District Court, "discovered a *new* manner of creating wealth" terminating "the age-long search for the Philosopher's Stone, which would turn into gold whatever it touched." It asserted that the *tax* paid on the dividends constituted *income* to the lessor corporation. Not only that, it asserted that the tax of *$61,422.06* constituted income *to the extent of $65,342.61*. As the District Court said "By merely laying the primary tax the Department thereby creates income, which is subject to a secondary tax; this in turn is further income, which is subject to a tertiary tax; and this in turn gives rise to a quarternary tax; and so on *ad infinitum*."

The District Court decided this case in favor of the taxpayer on the simple and elementary ground that the payment of the tax was not income to the Fitchburg Railroad Company, for the Fitchburg was not enriched thereby—it was no better off than if no income tax law had ever been enacted. The court relied on *Duffy v. Pitney*,[12] which arrived at the same conclusion in a case where an obligor under a "tax-free covenant bond" paid an obligee's income tax.

The reasoning in those opinions would seem to be a complete answer to all the contentions of the Government, but we feel that the court is entitled to a discussion of the various arguments urged on behalf of the Treasury Department's position and submit the following points.

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[12] 2 Fed. (2d) 230, cert. denied, 267 U. S. 595.

II.

Definition of Income.

In order to be taxable under the authority of the Sixteenth Amendment to the Constitution, and not be restricted to direct taxation apportionment in accordance with article I, section 2, paragraph 3, an item must be income within the definitions laid down by the courts. The leading definition is that enunciated in *Doyle* v. *Mitchell Bros. Co.*:[13]

> "In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets."

This definition has been adopted in practically every subsequent court decision involving the meaning of the word "income." It was enlarged on and explained by this court in *Eisner* v. *Macomber*,[14] as we shall show more fully below. The courts, in defining income, have held that the Sixteenth Amendment to the Constitution only permits the direct taxation without apportionment of items which are *in fact income*[15]—it is not sufficient that the item *resemble* income. In order to come within the requirement that it be in fact income, an item must be one which is "usually classed as income."[16]

The viewpoint of some economists that income might be defined as a series of satisfactions or a series of benefits is not commonly accepted or understood in the community, and when the taxing authorities have

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[13]247 U. S. 179.
[14]252 U. S. 189.
[15]*Towne* v. *Eisner*, 242 Fed. 704; aff'd 245 U. S. 418.
[16]*United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189, 195.

wandered from the practical to the theoretical in their search for taxable income, the courts have restricted them to those things falling within the commonly accepted meaning of the term "income." For example, when a taxpayer who had promised his sons a million dollars with which to start business, bought oil stocks for about $500,000, held them until they were worth about a million dollars, and gave them to his sons, who promptly sold them, the New York State Income Tax Bureau assessed an income tax upon the $500,000 alleged gain. It was argued that the taxpayer had made a gift equivalent to a million dollars, that he had the satisfaction of giving a million dollars, received credit for giving a million dollars, parted with a million dollars—that in order to part with it, he must have had it and must have realized it, even though the parting itself constituted the realization—and that therefore he should pay an income tax on the realized gain. But the court took the practical view that a gift partook rather of the nature of a loss than of a gain to the donor, and held that no taxable income resulted.[17]

Originally the Treasury Department, in dealing with gain upon the sale of assets acquired prior to the effective date of the income-tax law, measured income by the difference between the market value at that date (even though lower than cost) and the sale price. The courts held that, unless there was an *actual* gain —an excess of sale price over cost—no taxable income was realized, rejecting the proposition that income might be a purely theoretical thing represented by the difference between an unrealized value at a given date and a sale price.[18]

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[17] *People, ex rel. Wilson,* v. *Wendell,* 196 N. Y. App. Div. 596.

[18] *Brewster* v. *Walsh,* 255 U. S. 536.

In *Eisner* v. *Macomber*, *supra*, after quoting the definition of "income" from *Doyle* v. *Mitchell Bros. Co.*, this court added:[19]

> "Brief as it is, it indicates the characteristic and distinguishing attributes of income essential for a correct solution of the present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain,' which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. '*Derived—from—capital; the gain derived from capital*'; etc. Here we have essential matter: *Not* a gain *accruing* to capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the principal, *severed from* the capital, however invested or employed, and *coming in*, being '*derived*'—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal—*that* is income derived from property. Nothing else answers the description.
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> "The same fundamental conception is clearly set forth in the Sixteenth Amendment—'Incomes *from* whatever *source derived*'—the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution." (Italics in original.)

Other decisions to the effect that the word "income" in the constitutional amendment is to be taken according to its commonly accepted meaning are *Lynch* v. *Hornby*,[20] where this court indicated that Congress was authorized to tax without apportionment—

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[19]252 U. S. 189, at 207.
[20]247 U. S. 339, 344.

> "everything that became income in the ordinary sense of the word"—

and *Merchants Loan & Trust Co.* v. *Smietanka*,[21] where it insisted upon applying—

> "the commonly understood meaning of the term, which must have been in the minds of the people when they adopted the Sixteenth Amendment."

Congress may, in its discretion, tax *less* than all the income of a taxpayer. It may allow him specific exemptions, or credits for taxes paid to other sovereigns. It may allow the deduction of an inheritance tax, which does not go to reduce his income, but only to reduce the bequest (specifically excluded from his gross income) which, but for the tax, he would receive. But Congress may not directly tax (except by apportionment) *more* than all the income of a taxpayer—in the commonly accepted, common-sense meaning of the term. And the enactments of Congress will not be construed to have intended to levy an unconstitutional tax.

III.

A Financial Benefit Is Not Necessarily Income.

The principal argument urged below on behalf of the Government in this and similar cases is that payment by the lessee of income taxes asserted against the lessor, relieving the lessor of the necessity of making a similar payment itself, constitutes an advantage or benefit to the lessor which can be reckoned in dollars and cents, and that such an advantage or benefit must therefore be income. Of course, not all financial

[21] 255 U. S. 509, 519.

benefits are regarded as income—alimony,[22] damages for defamation,[23] or for physical injury to the person[24] are not regarded as taxable income to the recipients.

As Judge Lowell pointed out in the opinion below, the lessor is not enriched through the payment of its tax by the lessee. The contract was made at a time when there were no income taxes. The lessor contracted that its stockholders should receive certain dividends *net*. The subsequent imposition of the income tax made it necessary for the lessee to pay more than before—the additional payment being to the Government, and not to the lessor. But the lessor receives no more than if there were no income tax. It does not receive any additional income, but is merely protected against a reduction of the income which it does receive. The only advantage or benefit it receives is by contrast with a company which pays its own income tax.

But the fact that A may have such an advantage by contrast with B does not constitute income to A, unless he actually *receives* something which is derived from capital or labor, severed therefrom, and drawn by him for his separate use, as indicated in *Eisner* v. *Macomber*.

This is readily demonstrable by many examples: Suppose A is a judge of a state court, having a salary of $10,000, and B is counsel for a corporation, earning a similar salary. Suppose also that each has $20,000 income from investments. The income tax upon A might be as much as $1200[25] less than that on B, by

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[22] *Gould* v. *Gould*, 245 U. S. 151.

[23] Solicitor's Opinion 132, C. B. I–1, p. 92.

[24] Treasury Decision 2747.

[25] At 1918 rates.

reason of the exempt status of his salary as judge.[16] A, although receiving the same amount of money as B during the year, will have to pay $1200 less income tax. But no one would regard this $1200 as taxable income to A.

If it be suggested that the foregoing is not a fair example because the judge's exempt salary could not be reached indirectly even to the extent of $1200 if not taxable directly, it is easy to find examples not involving constitutional or statutory exemptions. Suppose A and B have equal incomes and exemptions, and each maintains an automobile for his pleasure. A carries casualty insurance, and B does not. Each has an accident resulting in damages to another person of $5000. The insurance company settles with A's victim, but B has to pay his own. In computing his tax B can not deduct from his income the damages he pays.[17] So, at the end of the year, A will be $5000 better off than B, due to his foresight in protecting himself against a reduction of his income by reason of something which might transpire during the taxable year. But no one would suggest that the payment by the insurance company to the person injured by A's car constitutes income to A. That situation is exactly parallel to that of the railroads in the case at bar. The reasons A is better off than B are that he has had foresight to contract in such manner as to protect himself against possible reduction of income, and that the tax law does not permit B to deduct his particular type of loss from his income in computing taxes. Similarly, the lessor railroad contracted, before any federal income tax was contemplated, against any reduction of

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[16] *Collector* v. *Day*, 11 Wall. 113.

[17] *Peyton* v. *Commissioner*, 10 B. T. A. 1129.

its income by such a tax should it ever be imposed; and the income-tax laws[28] prohibit a taxpayer from deducting its income taxes from its income in computing taxes.

Another example of financial benefit readily measurable in dollars and cents, but not taxable as income, is the use and occupation by a taxpayer of a dwelling-house which he owns. Suppose A and B each inherit $25,000, and that they have similar incomes from other sources. A invests his $25,000 in a dwelling, which he occupies. B invests his $25,000 in securities yielding $1500 a year, and pays the $1500 for rent of a dwelling. Under the statute, A's taxable income will be $1500 less than B's, for the financial advantage of owning his own home is not regarded as income, even though its rental value is readily measurable in money. So A will pay, say $150, less tax than B. But it would be absurd to suggest that this advantage of $150 should be treated as income to the extent of $150 and added to A's taxable income.

In *Bowers* v. *Kerbaugh Empire Co.*,[29] a taxpayer, prior to the World War, borrowed from a German bank certain moneys which it received in New York in dollars at then exchange rates (the mark being worth approximately 25 cents) and agreed to repay in marks, or their equivalent in dollars, at cable exchange rates. In 1921 when the mark had fallen to a value of about 2½ cents, the taxpayer paid back the loan in marks, which only cost it a small fraction of the dollars it had originally received. Here was a financial benefit or advantage obviously measurable in dollars and cents, but this court held it not to be income. Similarly, the

[28]Beginning with that of 1917.

[29]271 U. S. 270.

Board of Tax Appeals has held in several cases that where a corporation borrows money, issuing bonds therefor, and subsequently buys in the bonds before maturity, at a discount, it has not derived taxable income, though the financial advantage is indisputable and measurable in dollars and cents.[30]

Another case somewhat parallel to the one at bar is *Bowers* v. *New York Trust Co.*,[31] where a partnership, subject to excess-profits taxes, reduced its taxable income by the process of arranging that commissions on some of its contracts should not be paid to it, although it should continue to perform the work for which such commissions were payable. One of the partners received the benefit indirectly. It was held that the fact that one of the partners was in effect paid for work done by the partnership did not render the arrangement equivalent to income to the partnership (which was taxable as an entity). The court ruled against the Treasury Department's contention that the partnership received any taxable income in this indirect manner.

One of the commonest financial benefits measurable in dollars and cents, but not consisting of the actual receipt of money or property, is the benefit derived by a bankrupt when he is discharged. The liability side of his balance sheet is wiped out. He is relieved of the obligation of paying debts, but the Treasury Department has never strained construction so as to

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[30] *Appeal of Independent Brewing Co. of Pittsburgh*, 4 B. T. A. 870; *Appeal of New Orleans, Texas & Mexico Railway Co.*, 6 B. T. A. 436; *National Sugar Mfg. Co.* v. *Commissioner*, 7 B. T. A. 577; *Indianapolis Street Railway* v. *Commissioner*, 7 B. T. A. 397; *Meyer Jewelry Co.*, 3 B. T. A. 1319; *Houston Belt & Terminal Railway* v. *Commissioner*, 6 B. T. A. 1364.

[31] 9 Fed. (2d) 548.

assess income taxes against the financial benefit so derived.

The Government has never contended that the running of the statute of limitations against the collection of tax constitutes income in the year the statutory period expires. Certainly a taxpayer enjoys a *benefit* from the running of the statute. The liability is extinguished, but the taxpayer derives no gain from capital or labor in the year indicated. A benefit by statute is, we submit, no different from a benefit by contract. Each creates a legal right, recognized and enforcible, a benefit or advantage, but not a taxable gain.

The suggestion made on behalf of the Government that the payment by the Boston & Maine of the Fitchburg's taxes as part of the *consideration* under a contract renders it "income," is similar to the argument made on behalf of the Government and rejected by this court in *Edwards* v. *Cuba Railroad*,[32] a decision applied by the Board of Tax Appeals in *Appeal of Liberty Light & Power Co.*,[33] and *Appeal of Great Northern Railway Co.*[34] In these cases large financial benefits resulted to the taxpayers as consideration for services to be rendered, but the benefits were held not to constitute income.

It has been suggested at times, on behalf of the Government, that when the lessee pays taxes for the lessor, the lessor should treat such payment on its books as, first, a receipt by it of rent, and, second, a payment of taxes, the receipt going to increase gross income, but the taxes, under the statutory restriction, not going

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[32] 268 U. S. 628.
[33] 4 B. T. A. 155.
[34] 8 B. T. A. 255.

to diminish it in the computation of net income. This argument might be paralleled in the following example: Suppose that in 1915 (when losses by theft, not connected with business, were not deductible from gross income) a taxpayer was robbed of his pocketbook containing $1000. In his accounts he should enter the loss of $1000, but could not take credit therefor in his income-tax return. If shortly after the robbery his money was recovered by the police and returned to him, he should offset the loss on his books by the $1000 recovered. According to the Government's argument, this $1000 so recovered would be taxable income.

IV.

Taxes Paid by the Lessee Are Not "Rental" to the Lessor.

It is the Government's position that the payment of the lessor's income tax by the lessee was rental received by the lessor,[35] and in the court below, and in other similar cases, counsel for the Government have taken the position that the payments by the lessee constitute rental to the lessor or income in the nature of rent.

This court, in *Duffy* v. *The Central Railroad Company of New Jersey*,[36] states as follows:

> "The term 'rentals,' since there is nothing to indicate the contrary, must be taken in its usual and ordinary sense, that is, as implying a fixed sum, property amounting to a fixed sum, to be paid at stated terms for the use of property—and in that sense it does not include payments, uncertain both

[35] See computation, record below, p. 27.

[36] 268 U. S. 55.

> as to amount and time, made for the cost of improvements, *or even for taxes.*" (Italics supplied.)

The agreement by the lessee to pay the lessor's taxes can not be rental under the statement of this court, as it does not represent a *fixed sum* at *stated terms*, certain both as to amount and time, for the use of property. The advantage possessed by the lessor, in having the lessee pay its federal-income taxes, does not constitute rental received by it.[37]

Even if "in the nature of rent," this payment is not *income* to the taxpayer. Resemblances are not sufficient to support taxes. In *Towne* v. *Eisner*[38] the lower court very properly held that—

> "It is manifest that the stock dividend in question can not be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, unless *it is in fact income.*"

An examination of the lease will show that the only rental provided for was the dividends payable to the stockholders, for which they were afforded the right of personal action against the lessee in the event of default in payment. Necessarily, when the rental was made payable direct to the lessor's stockholders the lessor would be without property or funds with which to meet any obligations, so in taking over the lessor's entire property and the right to receive the entire income therefrom, the lessee undertook to assume all possible liabilities of the lessor during the 99-year term.

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[37]See also *Guild* v. *Sampson*, 232 Mass. 509.

[38]242 Fed. 704; aff'd 245 U. S. 418.

The lessor thereby went out of business for the term of the lease.[39]

The Government attempts to argue the case on the assumption that the situation is the same as if the lessor had received all of the operating income and deducted all expenses and charges, excepting only the Federal income taxes. Such an argument, in effect, disregards the fact that this case involves a *lease* and not an agency.

V.

The Decisions upon the Questions Involved.

As far as we have been able to discover, there have been only six judicial decisions directly upon the question of the payment of one's tax by another and the treatment of such payment as additional income to the former. These cases are—

Duffy v. *Pitney*, 2 Fed. (2d) 230; cert. denied 267 U. S. 595, overruling *Massey* v. *Ledcrer*, 277 Fed. 123.

Appeal of Mary Clark Kling, 1 B. T. A. 1048, acquiesced in by the Treasury Department, C. B. IV-2, p. 3.

Appeal of Providence & Worcester Railroad, 5 B. T. A. 1186.[40]

Horst v. *United States*, 64 Ct. Cl. 449.

Boston & Maine Railroad v. *United States*, 23 Fed. (2d) 343 (this case below).

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[39] *McCoach* v. *Minehill & Schuylkill Haven R. R. Co.*, 228 U. S. 295.

[40] The *Old Colony Trust Company* case (No. 130 here) was decided by the Board by a mere reference to the *Providence & Worcester* case.

In view of the refusal of this court to grant certiorari in *Duffy* v. *Pitney*, and the acquiescence by the Treasury Department in the court's conclusion, we may ignore *Massey* v. *Lederer*, which was directly overruled in the *Duffy* case.

In the *Duffy* case, a corporation had issued bonds containing a provision that it would pay any taxes assessed against the bondholders because of ownership of the bonds. Section 221 (b) of the Revenue Act of 1918 provided:

> "In any case where bonds, mortgages, or deeds of trust, or other similar obligations of a corporation contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by this title upon the obligee, or to reimburse the obligee for any portion of the tax, or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon or to retain therefrom under any law of the United States, the obligor shall deduct and withhold a tax equal to 2 per centum of the interest upon such bonds, mortgages, deeds of trust, or other obligations, whether such interest is payable annually or at shorter or longer periods, and whether payable to a nonresident alien individually or to an individual citizen or resident of the United States or to a partnership: * * *"

Under this provision the corporation *withheld* from the interest payable to a bondholder (the taxpayer) 2 per cent, and paid it to the Government. The bondholder was credited in the Government's books with this payment. But, because of the covenant, the corporation had to make good the 2 per cent to the bondholder, and paid it the entire 100 per cent of interest called for by the bond. The Government took the position that the payment by the corporation

of the 2 per cent to the Government constituted additional income to the bondholder, and assessed an additional income tax thereon. The Circuit Court of Appeals held otherwise, saying:

> "applying the customary canons of construction to this tax legislation [citations], we do not believe in such case that the sum withheld at the source is income. It does not fall within any accepted definition of the term [citation]. It is not a 'gain' or 'profit' derived from any of the sources named in the statute (Section 213), nor (whatever it is) has it ever been 'received' by the taxable. It is not property, nor is it a right to property for, not being payable to the obligee, he can not recover it in an action at law against the obligor. *In its effect upon the obligee it is at most an intangible but very real advantage for which he has contracted and as a result of which a part of his taxes is paid by another.* In thus contracting for the payment of a part of his tax by another the taxable in this case did only what Congress expressly permitted him to do. Therefore his conduct was lawful and was in no sense an evasion of the payment of taxes or an obstruction to the collection of taxes, as in some cases relied upon by the defendants [citations]. We are of opinion, therefore, that the sum withheld at the source in obedience to the statute is a tax. The best authority for this is the statute itself, and the statute calls it a 'tax.' Being a tax, *we can not find that the Revenue Act* requires that it be included in a return as 'income' and that the act *intends thus to impose a tax upon income and also a tax upon a tax.*
>
> "In holding that 'a tax equal to 2 per centum of the interest upon such bonds,' withheld at the source [quoting Section 221 (b) of the Act of 1918], is not 'income' and, therefore, should not be included in a tax return of the bondholder, it would seem that the case is ended; but the defendants

urge that, if a tax, it is nevertheless a tax upon the holder of the bond and if a part of it is paid by another the bondholder receives his interest in full (100 per cent) and 2 per cent more,—in effect 102 per cent,—and therefore, he should be taxed upon the total percentage. The plaintiff, on the other hand, maintains that the tax is upon the obligor corporation. In this regard it is certain that the act imposes upon the corporation the duty of paying the tax to the extent of 2 per centum of the interest. With this duty upon the corporation, the *taxable obligee* is expressly allowed to deduct this tax in his return, but the corporation obligor is not allowed to deduct it in ascertaining its own net income (Section 234 of the Act of 1918)." (Italics supplied.)

The Treasury Department has acquiesced in this decision and amended its regulations to conform.[41] That it is controlling, where applicable, is admitted by the Government. And it can not be distinguished from the question now before this court. Everything in the quotation above can be applied to taxes paid for a lessor by a lessee.

Counsel for the Government try to distinguish the two cases on the ground that, with respect to tax-free covenant bond interest, the statute provided for the payment of 2 per cent by the corporation, while in our case the obligation arose solely from contract. But an examination of the statute referred to shows that our case is stronger, in logic, for the taxpayer. The statute provided for *withholding* by the corporation of 2 per cent of interest due the taxpayer. This gave some basis to the Government's argument that the money paid by the corporation to the Government was the taxpayer's money, part of his interest disbursed

[41]Treasury Decision 3685.

for his account; that in addition he got the balance, 98 per cent of his interest, and a further sum (equivalent to 2 per cent) paid under the covenant. The court looked through this theorizing to the practical proposition that the payment of a tax by a corporation to the Government did not constitute *receipt* of anything *coming in* to the bondholder. In our case the Government can not make even that argument, for there was no withholding—no basis for saying that the money paid by the lessee to the Government was part of the income of the lessor withheld in accordance with statute, or that part of the rental paid to the lessor was not rental, but a sum equivalent to tax withheld, paid by reason of a covenant.

The arguments, other than the one just mentioned, of the Government in *Duffy* v. *Pitney*, were the same as those urged in our case. We believe this court will treat them as the Circuit Court of Appeals for the Third Circuit treated them.

It should be noted that the obligation upon corporate obligors under tax-free-covenant bonds arose by private contract, as does the obligation of the lessee railroad. Congress did not impose that obligation; it merely recognized it and legislated to preserve the right of the bondholder. In our case the lessor needed no such legislation.

The practice of lessee railroads agreeing to pay all taxes assessed against lessors has long been common and well known in the business and legislative world. If Congress had intended to treat these contracts as resulting in additional income to lessors and additional deductions to lessees, it is unbelievable that it would have failed specifically so to indicate by the time it went into such careful detail as it did in the Revenue Acts of 1917 and all subsequent revenue acts.

In the *Appeal of Mary Clark Kling*[42] the Board of Tax Appeals followed *Duffy* v. *Pitney*, and its decision was acquiesced in by the Commissioner of Internal Revenue.[43]

In *Horst* v. *United States*[44] the Court of Claims followed the *Duffy* opinion in a decision rendered January 16, 1928, saying, *inter alia:*

> "We are of the opinion that this tax paid by the obligor corporation was not 'gain' or 'profit' from sources named in the statute and was not 'received' by the taxpayer. *Eisner* v. *Macomber*, 252 U. S. 189, 207. It is not property and the holder of the bond could not recover it in an action at law against the obligor. Nor is it payable to the holder. See *Duffy* v. *Pitney*, 2 Fed. (2d) 230, where the question is very fully and satisfactorily discussed."

In Judge Lowell's opinion in the case at bar, he sustains the taxpayer's position on the authority of *Duffy* v. *Pitney*, and on the broad ground that the "Fitchburg Railroad gets no gain or profit. It is not made richer by the tax so paid. Its financial situation is the same as when no income tax is laid, and continues the same however high the rate of such taxation may become." This reasoning might be elaborated or paraphrased in many ways. In its essence it is but a logical conclusion that one must be enriched in order to be held to have taxable income and one is not enriched merely because he has had the foresight to contract against impoverishment. If a reduction of losses does not constitute income, as this court held in *Bowers* v.

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[42] 1 B. T. A. 1048.
[43] C. B. IV–2, p. 3.
[44] 64 Ct. Cl. 449.

Kerbaugh Empire Co.,[45] certainly the prevention of loss or other reduction of income can not constitute income.

The only case looking the other way is the *Appeal of Providence & Worcester Railroad Company*,[46] where the Board of Tax Appeals, in an opinion by Mr. Phillips, upheld the Government's contention and attempted to distinguish *Duffy* v. *Pitney*. With respect to the general conclusions of the Board we urge everything that we say elsewhere in this brief on behalf of our position. With respect to the attempt to distinguish *Duffy* v. *Pitney* we call attention to the fact that the Board placed the distinction principally on the ground that "the tax paid by the obligor was a tax upon it and not one imposed on the obligee, even though the same law reduced the amount of tax due from the obligee." This is obviously an error. The tax was not imposed upon the obligor, as the District Court for the Southern District of New York has shown in a well reasoned opinion in *Union Pacific Co.* v. *Bowers*.[47] Furthermore it could not constitutionally be imposed upon the obligor by reference to the obligee's income. The tax, based on income of the obligee, was collected from the obligee by a process of sequestration —a process similar to that provided for collection of taxes against non-resident aliens and non-resident foreign corporations.[48] The tax collected from the obligor under tax-free-covenant bonds, exactly like the tax collected from an obligor of an alien or a foreign corporation, was levied and assessed with

[45]271 U. S. 170.

[46]5 B. T. A. 1186. (Followed without detailed reasoning in several subsequent decisions of the Board, including the case which is now No. 130 here.)

[47]28 Fed. (2d) 370.

[48]Cf. Revenue Act of 1918, §§ 221 (a) and 237.

respect to income of the latter, was *withheld from that income* by the former, who was designated a "withholding agent."[49] The Circuit Court of Appeals carefully avoided committing itself to the argument of the plaintiff that the tax was upon the obligor, indicating that while the act imposed upon the obligor the duty of paying the tax, "the *taxable obligee* is expressly allowed to deduct[50] this tax in his return." Congress did not and could not impose a tax on one person measured by the income of another. What it did was to attach the credits of the taxpayer in the hands of the obligor and collect the tax by the withholding process. If the obligee, after having had a tax, stated by the statute to be withheld from his income, paid to the Government for him by the obligor, then received from the obligor the amount of that tax, and such receipt did not constitute additional income to the obligee, certainly the payment of a tax for the lessor by a lessee can not constitute additional income to the lessor.

The Board relied largely upon the decisions in *Rensselaer & Saratoga R. R. Co.* v. *Irwin*, 249 Fed. 726, and *Houston Belt & Terminal Ry. Co.* v. *United States*, 250 Fed. 1, which are two of a group of decisions in cases which are the main reliance of the Government in its brief here. In them lessee companies agreed (as in the case at bar) to pay, for the use of the property of lessor companies, dividends on the lessors' stock, directly to stockholders. The payments so made to the lessors' stockholders were treated as taxable income to the lessors. The Board states that it is unable to

[49] "The term 'withholding agent' means any person required to deduct and withhold any tax under the provisions of § 221 or § 237." Revenue Act of 1918, § 200.

[50] A deduction from taxes otherwise payable, not a deduction from income.

see any distinction in principle between those cases and the case where a lessor's income tax is paid. The distinction may readily be found, however, in the fact that in those cases the payments treated as income were *rent*, in this case they are *taxes;* and the decisions in those cases do not involve the necessity of considering the incidence of the tax in the levying of the tax, while the Government's position in this case does necessitate such process in spite of the denunciation thereof by this court in *Edwards* v. *Slocum*.[51] These same cases were relied on by the Government in *Duffy* v. *Pitney* and in the *Appeal of Mary Clark Kling*, and they did not seem to the Circuit Court of Appeals or the Board to be controlling or even parallel.

Since these cases seem to constitute the main reliance of the Government, we feel that they should be carefully examined. In the one decided in the First Circuit, *West End St. Railway Co.* v. *Malley*,[52] the lease "expressly refers to and treats these payments to stockholders as part of the agreed rent for the property," and it was upon this ground that the majority of the court treated such payments as income.

Similarly, in *Blalock* v. *Ga. &c. Co.*,[53] the lease provided that the lessee "will pay to the said shareholders respectively, as and for rent hereunder * * * quarterly sums or dividends." The basis of the court's decision seems to have been practically a disregard of the corporate entity, for it said (p. 389):

> "Rents accruing and paid for the use of partnership property are not made any the less partnership income by being made payable to the several persons in proportion to their respective shares

[51] 264 U. S. 61, 63.

[52] 246 Fed. 625, December 10, 1917; cert. denied 246 U. S. 671.

[53] 246 Fed. 387, 5th Circuit, November 7, 1917.

> or interest in the firm at the time the payment is made. There is no such difference between a partnership and a corporation as to require a different conclusion, and the only difference is that the recipients of the payment are the stockholders of a corporation instead of the members of a partnership."

In *Anderson* v. *Morris & Essex R. R. Co.*[54] the court held that the lessor railroad was not taxable under the 1909 law. It said, *obiter:*

> "Without going into the matter at length, it suffices to say that the fact that the lessee paid the *rent*, not to the corporate entity but to the stockholders and bondholders, can not prevent the act from applying to the money so paid if the other conditions of the act make its terms applicable. The fiction referred to can not be permitted to accomplish a fraud upon the statute and an evasion of its obligations." (Italics supplied.)

It should be noted that the court considered the payments as *rent*, and they might well come within the definition of this court quoted above[55] from *Duffy* v. *Central R. R. of New Jersey.*

In *Rensselaer, &c. R. R. Co.* v. *Irwin*[56] the majority of the court based its opinion largely upon the obiter language above quoted from *Anderson* v. *Morris & Essex R. R. Co.*, but it appears that the lessee had agreed to pay *rent* by paying interest on specified bonds and stated dividends on the lessor's stock. The court said:

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[54]216 Fed. 83, 2d Circuit, July 9, 1914.

[55]P. 24.

[56]249 Fed. 726, 2d Circuit, January 16, 1918; cert. denied 246 U. S. 671.

> "The application of the rent under the lease is a mere labor saving device, the effect being exactly the same as if it be paid to the lessor, and by it paid out, as far as necessary, to bondholders for interest, and the surplus and dividends to its stockholders. The description of the fixed sum to be paid by the lessee of 8 per cent to the lessor's stockholders as a dividend, shows that the payment is made as agent of the lessor."

The decision was subsequently explained by that court as follows:

> "Those cases regard a distribution to the constituent members [shareholders] of the corporate entity as equivalent to a payment to the entity itself and a distribution by it."[17]

In other words, in those cases the corporate fiction was disregarded and a payment to the stockholders treated as a payment to the corporation, the stockholders and the corporation being regarded as the same. Of course, there is no basis for regarding the United States and the lessor railroad in this case as the same.

In *Houston Belt & Terminal Railway Co.* v. *United States*[18] the lessee companies paid interest and sinking funds on the lessor's indebtedness directly to the creditors, *as rent*. The court said:

> "We think it clear that the payment of such sums, in pursuance of their covenant, was but a payment of rent by the tenant companies to the terminal company for the use of the premises occupied by them"—

and the *Blalock* case was cited.

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[17] *Bowers* v. *New York Trust Co.*, 9 Fed. (2d) 548.

[18] 250 Fed. 1, 5th Circuit, April 10, 1918.

It should be noticed that every one of these cases was decided before this court explained the definition of income in *Eisner* v. *Macomber*. Subsequent cases on the same question have not contained any reasoning, but have merely applied the prior rulings, *e. g.*, *Northern R. R. Co. of New Jersey* v. *Lowe*,[59] *United States* v. *Western Union Tel. Co.*[60] We respectfully suggest that the court might find it interesting to re-read the dissenting opinions of Judge Aldrich in the *West End St. Railway Co.* case, and of Judge Hough in the *Rensselaer & Saratoga* case, in the light of this court's exposition of the nature of *income*.

This group of cases was relied on by the Government in *Massey* v. *Lederer*,[61] one of the tax-free-covenant bond cases, and the District Court accepted them as sustaining its judgment in favor of the Government. But the Circuit Court of Appeals for the Third Circuit overruled the *Massey* case in *Duffy* v. *Pitney*, as we have shown above, by deciding the same question the other way. Their opinion does not state that they considered the *Massey* case, but the fact that the dissenting Judge (Thompson) was the author of the *Massey* opinion leaves no question in our minds that it was carefully examined. The court specifically mentions the group of stockholder cases relied on by the Government, but does not regard them as in point.[62]

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[59]250 Fed. 856.

[60]19 Fed. (2d) 157.

[61]277 Fed. 123 (D. C. E. D. Pa.), December 30, 1921.

[62]If a taxpayer creates a trust for the benefit of others, conveying specified property to a trustee for a term of years, to manage the same, pay all expenses and taxes, and distribute the income periodically among the *cestuis que trustent*, that income is taxable under the Revenue Act of 1916 (Sec. 2 b) and subsequent Revenue Acts (Sec. 219) to the beneficiaries receiving the same (or to the trustee where the

Where the payment of interest on a lessor's bond is concerned, the question of whether it constitutes income or not is now academic because the interest would be deductible to the lessor and this deduction would off-set the income. With respect to the payment of dividends by a lessee to its lessor stockholders, it seems to us that the only ground upon which the cases discussed above can be sustained is that the nature of a dividend implies corporate income in the process of distribution, and there is no similarity between that and payment of taxes on that very income.

The exaction by the lessor of a payment of a specified sum regularly at specified periods, whether to itself or to its stockholders, was essentially rent—an exaction for the use of property—and was so recognized in the leases and by the courts. But the provision that the lessee should maintain the property in its then present condition, and the payments made by the lessee toward such maintenance, were not compensation to the lessor for the use of property, but merely protection to the lessor against loss in value of its capital. The payments made by the lessee, protecting the lessor's capital,

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income is held for future distribution) and not to the grantor. There would seem to be no sound reason why a corporation could not create such a trust for the benefit of its stockholders, and cease, for the period of the trust, to have any income of its own. The moneys received by the beneficiaries would be income from trust funds, taxable as such, rather than dividends. The courts which decided the cases under discussion might well have held that the leases constituted trusts for the benefit of the stockholders of the lessor companies, instead of ignoring the differences between corporation and stockholders (which this court refused to do in *Eisner* v. *Macomber*, repudiating *Collector* v. *Hubbard*, 12 Wall. 1) and treating payments to the latter as to the former.

did not constitute income to the lessor. The provision with respect to taxes was a similar provision, protecting the lessor's income. At the time the lease in the case at bar was made, the possibility of a federal income tax was extremely remote. Yet, in its foresight, the lessor protected its income against reduction by that possibility. It did not provide for definite sums of money to be paid at specified periods, any more than in the case of the requirement for maintenance of the property. It merely required that its income be protected from diminution just as its principal was to be protected from depreciation.

The Government urges that if the lessee in No. 129 had paid to the lessor the amount which the latter was called upon to pay as taxes the money would be income in the hands of the lessor as a gain derived from the use of its property. This, we submit, is not so. The lessee was not obligated to pay the taxes to the lessor. Under such circumstances, if the lessee had paid the amount of the lessor's tax to the lessor, the lessor would have received it, not for its own use and enjoyment, as in the case of rent, but as a trustee for the sole purpose of paying it to the United States.

The Government's brief (p. 15) makes a point that the principle contended for on behalf of the Government has received judicial approval, and cites *In re Levalley's Estate*[63] and *In re Irwin's Estate*,[64] in each of which the will provided for the payment of legacy taxes out of the residue, and the residuary legatee was a charitable corporation. The state courts, in computing the taxable legacies, added to them the taxes paid out of the residue. These decisions are in direct con-

[63]191 Wis. 356, 210 N. W. 941.
[64]196 Cal. 366, 237 Pac. 1074.

flict with that of this court in *Edwards* v. *Slocum*.[55]

In that case this court said (p. 62):

> "The Government required the payment of an additional sum reached by deducting from the exempted estate the amount of the tax to be paid, or in other words, adding the amount of the tax to the taxable estate."

and (p. 63):

> "[the statute] thus manifestly assumes that the net estate will be ascertained before the tax is computed."

In the *Slocum* case the tax on the taxable "net estate" was paid out of the exempt residue, and did not reduce the legacies received by the legatees entitled to the "net estate," and the Government attempted to add the tax to the "net estate." In our case the tax on the taxable "net income" was paid by the lessee and did not reduce the rent received by the lessor entitled to the "net income."

In the estate tax case the "net estate" was computable by reducing the gross estate by all logical charges going to reduce what would be eventually enjoyed by the legatees, *but not by the estate tax*. In our case the "net income" is computed by reducing gross income by all logical charges going to reduce what the lessor would eventually enjoy, *but not by the income tax*.

But in neither case does the payment of the tax by another *increase* the net amount upon which the tax is computable.

Substituting "income" for "estate," we insist, in the language of this court quoted above, that *the statute "manifestly assumes that the net income will be ascertained before the tax is computed."*

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[55]264 U. S. 61.

VI.

The Government's Theory, Carried to Its Logical Conclusion, Results in Absurdity.

Five different methods of applying the Government's theory that the payment of a lessor's taxes by its lessee constitutes income to the lessor have been urged or applied by the Government in different proceedings. An exposition and classification of these five methods, is annexed hereto as Appendix A.[66]

If a tax paid by a lessee for a lessor is additional income to the lessor, and an additional tax must be assessed upon it, that additional tax is equally payable by the lessee. It is the same kind of a tax (if it is not an income tax it can not be asserted under an income-tax law—nor could Congress impose it without apportionment), and subject to the same provisions of the lease. When paid by the lessee the additional tax will be additional income to the lessor just as much as the original tax. So, logically, it is necessary to complete the pyramid. That is what the Government did in this case of the Fitchburg Railroad Company. It adopted a short cut in the computation, explained in Appendix A, at pages 54, 55.

The Government's brief here ignores the fact that it was agreed in the District Court[67] that this is a test case for others, and that the reason given by the Circuit Court of Appeals for certifying the question is that numerous cases are pending in which this question is involved (R. 3). The Government urges that it is very simple to divide the rental income by .94 and take 6 per cent of the quotient. But since this is a

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[66]P. 53.

[67]See opinion of District Court at p. 64, below.

test case we must consider the effect of any decision on cases where there is not merely a simple 6 per cent tax, but excess profits taxes (and even war profits taxes) involving many elements beside income and running as high as 80 per cent.

The result is monstrous. A by no means impossible example will show the extreme to which the theory carries us. Suppose that, for the year 1918, the income from rents of the A corporation was $1,000,000, and that its invested capital was such that its tax for 1918 was $500,000, part of which was computed at the rate of 80 per cent on income.[68] Any additional income attributed to A would result in further taxes at 80 per cent. Suppose, further, that the B corporation was under obligation to pay all taxes of the A corporation. On the theory that the payment of the $500,000 tax by the B corporation constituted $500,000 further income to the A corporation, an additional tax of $400,000 would be assessable thereon. If paid by the B corporation, this $400,000 would be just as surely income to the A corporation as was the $500,000, and a tax should be assessed on it of $320,000. Again, the payment by B of the $320,000 would be income to A, resulting in a tax of $256,000. This process would have to be repeated until the last additional tax amounted to less than half a cent and could be ignored under the law. It would require 82 separate computations of tax, and the total tax which the B corporation would have to pay would be $2,499,999.86—only 14 cents short of 250 per cent on the actual income of the A corporation. We speak of the process as pyramiding, but the column of figures which we must add together to compute the tax looks more like an obelisk than a

[68] The 80 per cent rate appeared in the 1918 law.

pyramid. Of course, an algebraic computation might be substituted for the 82 arithmetical ones it was necessary to make in the hypothetical case, but with invested capital involved as a factor it would be far from simple,[69] and "algebraic formulae are not lightly to be imputed to legislators"[70]—nor, we might suggest, are computations involving pyramiding.

By the same token, if the pyramiding were done on the theory that the payment of the 1917 tax in 1918 constituted income for 1918 rather than for 1917,[71] the result would be equally absurd. If the tax rates provided in the 1918 law were continued, it would take eighty-three years to pay off the tax in our hypothetical case, and the aggregate would be 250 per cent of the actual income.

VII.

The Government Can Not Render Its Theory Reasonable by Arbitrarily Departing from It after One Computation.

If Congress enacted a tax at a rate so high that it was obvious that it was intended to act as a prohibition rather than a tax, and the Government feared that it would be held invalid, the Treasury Department could not cure it by saying, "Well, we shall only collect taxes at half the rates indicated in the statute." This would be a direct trespass upon the legislative function of Congress. But that is exactly parallel to what the Treasury Department has done in one manner, in many cases, and the Board of Tax Appeals has done in another. They say, "We shall cure the absurdity of our theory by not carrying it to its logical conclusion

[69]See Appendix A, at pp. 55–59.
[70]*Edwards* v. *Slocum*, 264 U. S. 61, 63.
[71]As held by the Board of Tax Appeals in No. 130.

and shall abandon it after one round." In some cases the Treasury Department has applied the method of computation described in Appendix A[72] as the vertical truncated pyramid method. It has said the tax paid for 1917 is income for 1917, and an additional tax should be computed thereon, but this additional tax, although equally an income tax and equally payable by the lessee company, and although actually paid by the lessee company, will *not* be treated as further additional income to the lessor. And the Board of Tax Appeals has done the same thing, as we show in Appendix A,[73] except that it regards the 1917 tax as income for 1918. If their construction of the statute —that the tax on income is additional income—is correct, they have no jurisdiction to repeal the statute in part by saying that they will treat taxes on rent as income, but will not treat taxes on something "in the nature of rent" as income. *Both* must be taxes on income *or neither is*.

Government's counsel have attempted to justify this truncation of the pyramid by saying that they construe the lease to mean that the lessee will pay the first tax, but that the lessor will pay the second. A glance at the phraseology of the leases shows that this argument is without foundation. The lessee must pay *all* taxes on the lessor's income—and certainly it can not be claimed that the second exaction is not a tax on the lessor's income, without admitting that it is not an income tax, therefore not assessable under the income-tax law or the Sixteenth Amendment.

Similarly with the truncation adopted by the Board of Tax Appeals, if the 1918 tax must be computed on

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[72]See p. 59.

[73]See pp. 60–62.

the base of original income plus 1917 tax, and paid accordingly, there is no justification for saying that part, but not all, of the 1918 tax so paid constitutes income for 1919, to be added to 1919 rents in computing the 1919 tax.

VIII.

The Practical View.

The courts have always taken a practical, common-sense view in construing the word "income" as found in the Constitution and the statutes. What is the common-sense view of the situation presented here? The lessee took over the lessor's railroad long before the Sixteenth Amendment. It acquired complete control over it and assumed full responsibility for it. It did not buy the fee outright, but took a long term, for which it agreed to pay a fixed rental. The fact that the term was only for years and that the consideration for the conveyance was paid quarterly are the only differences between the situation that exists and that which would have existed if there had been an outright purchase of the fee. The lessee company treats the leased road exactly like its owned lines; it bears the upkeep, replacement, improvement costs; it pays the taxes and the operating expenses just as if it owned the road. It mingles the receipts with receipts from its owned lines and figures its gains or losses on the whole thing. The repairs and renewals the lessee must pay for, under the terms of the lease, are really its own repairs and renewals, made for its own benefit, and the taxes it pays are part of its operating expense.[74]

The obligation to pay the taxes was assumed by the

[74] *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388.

lessee for the reason that it alone would be in a position to pass them on to the rate-paying public.

The lease contained the usual provisions of long-term railroad leases. Because such leases have been generally used, and because Congress was familiar with the control, in one manner or another, of railroads, it must be presumed to have had full knowledge of the general features of such railroad leases when it enacted the Revenue Act of 1917.

This court has held that under the 1917 Act income should be computed in accordance with the method of bookkeeping employed by the taxpayer."

It certainly is not commercial usage, or the practice of railroads, to treat the income tax paid by the lessee as resulting in income to the lessor.

Article 127 of Regulations 33, Revised, the Treasury Department's interpretation of the 1917 Act, provides:

> "Approved accounting practices.—Pursuant to the foregoing provision, corporations keeping their accounts in strict accord with the methods prescribed by municipal, state or federal authorities, or in accord with approved standard accounting practices, consistently followed from year to year, will be permitted to make their returns of annual net income on the basis of the accounts so kept, provided such systems of accounting clearly and correctly reflect the net income of each year."

The books of account of the lessee and lessor companies are required to be kept in strict accordance with the classification of accounts and instructions of the Interstate Commerce Commission, promulgated under the authority conferred upon it by Congress.

It is assumed that the primary object of this classifi-

"*United States* v. *Anderson*, 269 U. S. 422.

cation of accounts, and the instructions pertaining thereto, is to have the true net income of railroad companies reflected by their books and records, and that such object has been attained.

The taxpayer's accounting is governed by the following instructions of the Interstate Commerce Commission:

> "Account 532, Railway Tax Accruals.
>
> "This account shall include accruals for taxes of all kinds (including Federal income tax) relating to railway property (including floating equipment, if any), operations and privileges, whether based upon the valuation of the property, the amount of stock and bonds issued or outstanding, gross or net earnings, dividends declared, number of passengers carried, quantity of freight transported, length of line operated or owned, rolling stock operated or owned, or other bases.
>
> "The taxes on leased property shall be included in this account by the carrier obligated to assume such expenses under the terms of the lease.
>
> "Note A: Taxes on leased property paid by one party to the lease and chargeable to the other party to the lease, shall be charged directly to the party bearing the expense and not included in the income account of the party first making payment."

Taxes paid by the lessee on the lessor's income, under the terms of the lease, according to Interstate Commerce Commission regulations are therefore proper charges against the lessee's operating income for the year in which they are paid or to which they apply. The instructions promulgated by the Interstate Commerce Commission do not provide for the inclusion in the lessor's income account of such taxes payable by the lessee, nor is it the practice, under the supervision of

the Commission, so to include the taxes in the lessor's income. On the contrary, those instructions affirmatively provide that such taxes shall not be reflected in the lessor's income. If such payment of taxes is to be regarded as additional income to the lessor, it will result in railroad corporations having to make their returns to show net income in a manner directly opposed to the accounting method prescribed by the Interstate Commerce Commission, and contrary to established commercial usage.

This court[11] has recognized that federal-income and excess-profits taxes are to be considered as operating expenses in the determination of rates. The greater the taxes, the larger the amount to be recovered from the public through rates for the service. Necessarily, the inflation of federal taxes upon a basis of fictitious (rather than actual) income, results in an excessive tax upon the lessee, which, in return, must be recovered from the public.

As we have shown under Point V above, this court took the practical view in *Edwards* v. *Slocum*, a parallel case involving the estate tax. We call the attention of the court to another parallel situation, arising under the excise tax provisions of the same revenue acts which impose the income and profits taxes and the estate taxes. The Revenue Act of 1918 imposed excise taxes upon the sale of specified articles. Sections 628 and 900 imposed taxes upon the manufacturer or producer; section 905 imposed taxes on the dealer; sections 904 and 907 imposed other taxes specifically upon the purchaser but required the seller to collect them. The purpose of Congress as expressed in Committee reports was twofold: to raise revenue and to discourage ex-

[11] *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388.

travagant spending during the war. Section 1007 of the Revenue Act of 1917, and sections 906, 1312 and 1319 of the Revenue Act of 1918 recognized that the tax might properly be passed on, in addition to the price. The Treasury recognized the difference between these two methods, and ruled that if the seller merely charged a higher price, he should compute the tax on the price charged, but if he billed the price and the tax separately, the tax should be computed on the net price, not on the total payment made by the purchaser. For example, Article 8 of Regulations 52, provided:

> "If the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sale price, but where the tax is billed as a separate item it is not to be considered as an increase in the sales price." cf. Sales Tax Ruling 495, C. B. II-2, p. 295, and Reg. 47, Art. 3.

Similar rulings were made with respect to automobiles, jewelry, candy and other articles with respect to the sale of which tax was imposed *on the seller*. The Circuit Court of Appeals for the Fifth Circuit, in *Elmer Candy Co.* v. *Fauntleroy* (24 Fed. (2d) 95), said:

> "The regulation of the Commissioner of Internal Revenue so construes the law, is fair, should have universal application and it should be given retroactive effect."

The base of the tax is not the full amount received, but that part of the amount received *as price* without increase for the tax, which is passed on with implied statutory authority, and assumed by the buyer in the same manner as the lessor's income taxes are assumed by the lessee here. The Government has litigated numerous cases on the question of whether the price and tax were sufficiently segregated in the bill to justify computation on the *net* price. But where the buyer wittingly paid the tax *as a tax*, although the statute

imposed it on the seller, even the Treasury Department has never suggested that it should be added to the price in computing the tax.[17] The clear justification for the regulations authorizing the vendor to pass on the tax without collecting a tax on the tax will be found in the statutes referred to above. Apparently all of those sections were not called to the attention of this court in *Lash's Products Co.* v. *U. S.* By sections 906 and 1312 (1) (2) (3), Congress itself passed the tax on to the vendee in those cases where by pre-existing contract the vendor had precluded himself from passing it on. By Section 1319 Congress recognized the right of the vendor to pass the tax on —through the process of imposing a penalty on him if he collected from the vendee *as tax* something that was *not* tax.

Congress relieved the vendor of the excise tax where he, without notice thereof, had so contracted that he could not pass it on. Surely it can not be presumed to have intended to *penalize* the far-sighted lessor who, *prior to the Sixteenth Amendment*, had contracted for the payment of any income taxes by the lessee, by the process of taxing him upon the taxes so paid under the lease.

In the excise taxes the *form* of the transaction is accepted as controlling. A seller can segregate price and tax and pay tax on price, not on price plus tax. The same is true of the estate tax, as we have shown.[18] Also with income taxes upon tax-free covenant bonds.

> "Taxes are very real things and statutes imposing them are estimated by practical results."[19]

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[17] See *Cliquot Club* v. *U. S.*, 13 Fed. (2d) 655, 18 Fed. (2d) 970; *Lash's Products Co.* v. *U. S.* (64 Ct. Cl. 252); *White Rock, etc., Co.* v. *Edwards*, 23 Fed. (2d) 539; *Elmer Candy Co.* v. *Fauntleroy, supra; Smith Grapejuice Co.* v. *U. S.*, 63 Ct. Cl. 140.

[18] *Edwards* v. *Slocum*, 264 U. S. 61.

[19] *Nichols* v. *Coolidge*, 274 U. S., 531, 541; 47 S. Ct. 710, 713.

IX.

Distinction between Lawful Avoidance and Illegal Evasion of Taxes.

Point IV of the Government's brief is entitled "*Evasion of income tax obligations would result if payment of tax by third persons were not taxed as income to person for whom paid.*"

This is the Treasury's old stand-by. It does not accuse the Boston & Maine and Fitchburg of conspiracy in 1900 to evade taxes under a law passed in 1917, but urges that to prevent evasion by others in the future, the statute must be given a construction, in connection with this old lease, which is contrary to common understanding and the results of which are absurd.

We do not ask for a decision that a contract made after 1913 need have the effect we claim for the lease of 1900.

Aside from that, however, we point out that avoidance of tax by legal forms has been common ever since "lease and release" was devised to avoid the Statute of Enrollments.[50] Examples could be multiplied indefinitely. The Revenue Acts are amended at every session of Congress to close loopholes by which taxes can be legally and legitimately avoided.

Though it be a device to avoid the revenue acts, and though its operation may have the effect of avoiding them, yet if the device be carried out by means of legal forms, it is subject to no legal censure.[51]

This should be a sufficient answer to the Govern-

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[50] cf. Blackstone, Comm. II, 339.

[51] *U. S.* v. *Isham*, 17 Wall. 496.

ment's argument that a decision in favor of the taxpayer might show the way to others to avoid taxes.

X.

Principles of Construction Applicable.

The word "income" in the statute, as in the Constitution, should be construed in its generally accepted meaning. *Eisner* v. *Macomber*, 252 U. S. 189; *Lynch* v. *Hornby*, 247 U. S. 339, 344; *Merchants Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509; *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189.

It is the long-established practice of the law not to regard the incidence of a tax in the levying of a tax. *Edwards* v. *Slocum*, 264 U. S. 61.

Algebraic formulae are not lightly to be imputed to legislators. *Edwards* v. *Slocum*, *supra*.

In case of doubt, taxing statutes are construed most strongly against the Government and in favor of the citizen. *Gould* v. *Gould*, 245 U. S. 151.

And the plain, obvious, and rational meaning of a statute is always to be preferred. *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364.

CONCLUSION.

The certified question should be answered in the negative.

Respectfully submitted,

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January, 1929.

APPENDIX A.

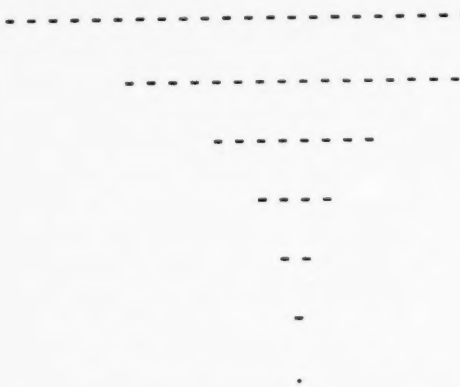
FIVE DIFFERENT METHODS OF COMPUTING TAXES UNDER THE GOVERNMENT'S THEORY EXPLAINED AND NAMED FOR PURPOSES OF DISCUSSION.

If the taxpayer is right in its contention that a Federal income tax paid by a lessee for a lessor under the terms of the lease is not to be regarded as income to the lessor for the purpose of calculating the lessor's Federal income tax, there is no difficulty in computing the tax. But, under the Government's theory that payment of the lessor's tax by the lessee constitutes taxable income to the lessor, five different methods of calculation have been offered as correct. It is regarded as advisable to describe these methods, and give each a name to simplify discussion of the merits of the underlying proposition and of the various methods, respectively.

(*1*) "*The Vertical Completed Pyramid Method.*"

First is the method adopted by the Government in computing the tax of the Fitchburg Railroad in the case at bar (No. 129). Under this method the 1917 tax is regarded as accruing in 1917, and the Government's underlying proposition is carried to its logical conclusion. The lessor's 1917 income from rents is taxed at statutory rates; this tax, being payable by the lessee, is regarded as additional 1917 income to the lessor, and an additional 1917 tax thereon is computed at statutory rates. The additional tax, being unquestionably an income tax, is equally payable by the lessee, and is therefore regarded as, in turn, further additional 1917 income to the lessor, and a further additional tax for 1917 is computed thereon, to be

assessed against the lessor but paid by the lessee. The process is continued until a final additional tax of less than half a cent makes it unnecessary to go any further. The process of pyramiding is carried through to the point where the additional tax is too small to be computed. It might be graphically illustrated thus:



The sum of all the lines constitutes the total tax to be assessed. For convenience, we shall call this method of computation the "vertical completed pyramid method." The tax may be found by a series of computations, or by a single computation based on a formula. Where the tax is computed by reference to income alone, as in the case of relatively small income, not subject to excess-profits taxes, the formula is simple. For example, in the case at bar, there was no excess-profits tax, and the income-tax rate was only 6 per cent. But the Government regarded the tax of 6 per cent on income of $1,023,700.93 or $61,422.06 as additional income *to the extent of $65,342.61*, see Record in this court, p. 2. Instead of starting with the rent income

of $1,023,700.93 and computing a 6 per cent tax thereon, a 6 per cent tax on that tax, another 6 per cent tax on that, and so forth, the Government merely divided the original income by .94, called the quotient taxable income, and computed the tax thereon at 6 per cent (see statement annexed to stipulation in the trial court).[52] That the result would be the same either way can be seen by comparing the following computations:

Income				Tax
$1,023,700.93	×	.06	=	$61,422.06
61,422.06	×	.06	=	3,685.32
3,685.32	×	.06	=	221.12
221.12	×	.06	=	13.27
13.27	×	.06	=	.80
.80	×	.06	=	.05
.05	×	.06	=	.00
$1,089,043.55	×	.06	=	$65,342.62

$1,023,700.93 ÷ .94 = $1,089,043.54. Income
$1,089,043.54 × .06 = Tax $65,342.61.

The discrepancy of one cent is due to dropping minor fractions.

The sum of taxes included in the vertical completed pyramid is a comparatively simple matter to compute where nothing but an original income and a fixed income-tax rate is involved. But when we get into excess-profits taxes, involving several factors—invested capital, prewar invested capital, average prewar income, income for taxable year, specific credit, excess-profits credit rate, several excess-profits tax rates, and income-tax rates, with specified inter-relations—it is no longer a simple matter.

[52]Record below, p. 27.

Let us take simplest possible example of the vertical completed pyramid method, applied to a tax upon income falling into only the lowest excess-profits tax rate indicated in the 1917 law. Assume a lessor railroad with $5,000,000 statutory "invested capital," having leased its property long before the war to a lessee railroad for $700,000 a year with the condition that the lessee should pay the lessor's taxes, the prewar income rate, involved in fixing excess-profits credits, assumed to be 9 per cent (the maximum).[53]

The first computation would be as follows:

Invested capital	$5,000,000.00		
9% thereof	$450,000.00		
Specific credit	3,000.00		
Excess-profits credit	$453,000.00		
Net income	$700,000.00		
Less:			
Excess-profits credit	453,000.00		
Taxable at 20%	$247,000.00	Excess-profits tax	$49,400.00
Net income	$700,000.00		
Less:			
Excess-profits tax	49,400.00		
Taxable at 6%	$650,600.00	Income tax	39,036.00
Total tentative tax			$88,436.00

This $88,436 of tax, being payable by the lessee, is regarded as income to the lessor, so we must begin over:

---

[53] If a lower prewar income rate be postulated the resulting taxes will be higher.

Original net income	$700,000.00		
Increase for tax	88,436.00		
Adjusted net income	$788,436.00		
Less:			
Excess-profits credit	453,000.00		
Taxable at 20%	$335,436.00	Excess-profits tax	$67,087.20
Adjusted net income	$788,436.00		
Less:			
Excess-profits tax	67,087.20		
Taxable at 6%	$721,348.80	Income tax	43,280.93
Total tentative tax			$110,368.13

But if the first tentative tax is payable by the lessee, the second is equally so payable, for it is equally covered by the provisions of the lease, so we will have to repeat the computation:

Original net income	$700,000.00		
Increase for tax	110,368.13		
Adjusted net income	$810,368.13		
Less:			
Excess-profits credit	453,000.00		
Taxable at 20%	$357,368.13	Excess-profits tax	$71,473.63
Adjusted net income	$810,368.13		
Less:			
Excess-profits tax	71,473.63		
Taxable at 6%	$738,894.50	Income tax	44,333.67
Total tentative tax			$115,807.30

The process must be repeated again and again until we reach a computation showing a result which differs from the previous one by less than half a cent. The successive computations under our example, following those given above, will show taxes respectively as follows:

$116,152.21
117,241.75
117,511.95
117,579.46
117,595.71
117,599.74
117,600.74
117,600.99
117,601.05
117,601.06

To carry the process any further would result in a change of less than half a cent, so we can stop.

Of course, the problem could be solved algebraically with less effort. The formula for a tax such as that in our example would be:

Let A represent the original income.

Let B represent the excess-profits credit.[11]

Let X represent the tax. Then—

$$X = \{ X + A - [(X + A - B) .2] .06 \} + [(X + A - B) .2].$$

If we had a case involving a higher rate of income as compared to invested capital, so that it became necessary to compute taxes at several different excess-profits tax rates, the formula would become necessarily more complex. The formula for a 1917 tax, on income taxable at all the rates provided by the statute would be:

Let A represent invested capital.

Let B represent excess-profits credit.

Let C represent original income.

Let X represent the tax. Then—

---

[11]An item in itself involving several factors, see § 203, quoted on p. 3, *supra*.

$$X = [(.15A)\ .2 + (.05A)\ .25 + (.05A)\ .35 + (.08A)\ .45 + (C + X - B - .33A)\ .6] + \{ C + X - [(.15A)\ .2 + (.05A)\ .25 + (.05A)\ .35 + (.08A)\ .45 + (C + X - B - .33A)\ .6] \{ .06.$$

This formula will give the tax where it is known that *all* the excess-profits tax rates will be reached. But if it is impossible to tell which rate will be the highest reached until we know what the final taxable income will be, it is necessary to adopt a much more involved formula, or go back to arithmetic and make anywhere from twenty to upward of eighty computations.

(2) *"The Vertical Truncated Pyramid Method."*

It is apparent that the "vertical completed pyramid method" of computing the tax, when applied to excess-profits taxes, involves calculations so extensive (if done arithmetically) or so involved (if done algebraically) as to be too absurd to be attributed to the intent of Congress. Probably because of this absurdity, the Treasury Department decided, *in some cases*, to avoid the absurdity by *not* carrying the theory to its logical conclusion. It said: "The tax on the original income of the lessor, payable by the lessee, will be regarded as additional income to the lessor, and an additional tax will be assessed thereon, but this additional tax will *not* be regarded as income to the lessor, even though the lessee pays it." The effect was to truncate the pyramid after the second computation, and to stop there.

So we call this second method of computation the "vertical truncated pyramid method."

Under the "vertical truncated pyramid method," the tax on the lessor's 1917 income is regarded as additional 1917 income to the lessor, and an additional tax

for 1917 is computed thereon. There the process stops. Graphically it may be illustrated:

- - - - - - - -

- - - -

That such a method constitutes a denial by the Government of its own theory, or a repeal of part of the tax imposed by Congress is shown under Point VI, p. 19, above.

(3) "*The Hybrid Method.*"

The third method is that adopted by the Government in one of the cases tried in the District Court with the case at bar—that involving the taxes of the Concord and Montreal Railroad (No. 2351 in the District Court). It is a composite of the two methods described above. In so far as the income tax at 6 per cent is concerned, the theory of treating taxes as additional income is carried to its logical conclusion—the pyramid is completed, through the process of dividing $610,050.02 by .94 and getting $648,989.38 net income—but when it comes to the computation of excess-profits taxes, the theory is *not* carried to its logical conclusion, but the pyramid is truncated. The result is that the total tax assessed, and indicated as payable by the lessee, the Boston & Maine Railroad, is $41,400.28, although the net income was increased for the purpose of making this computation by the difference between $610,050.02 and $648,989.38—only $38,939.36.[15]

We designate to this method of computation as the "hybrid method."

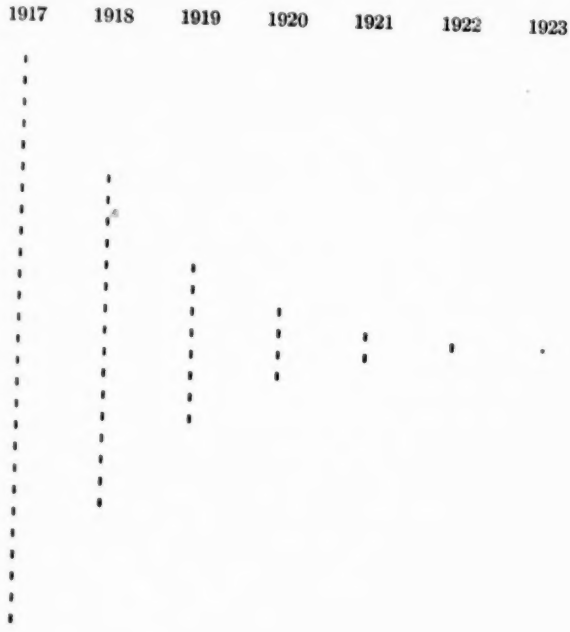
(4) "*The Horizontal Completed Pyramid Method.*"

The Board of Tax Appeals, in *Appeal of Providence & Worcester Railroad Co.*, 5 B. T. A. 1186, rendered an

[15] Record below, pp. 27–30.

opinion to the effect that the lessor's taxes, being payable by the lessee, constituted additional income to the lessor, but since they were not due and payable until the following year, they served to increase the lessor's taxes in the second year rather than the first. Upon the receipt of this opinion, counsel for both the Government and the taxpayer understood it to mean that the result would be as follows:

The 1917 tax would constitute additional 1918 income, and an additional 1918 tax would be assessed thereon. This additional 1918 tax would constitute additional 1919 income, and an additional 1919 tax would be assessed accordingly. The process would continue until the additional tax for some year was less than half a cent. The result might be graphically indicated thus:



We designate this fourth method of computation as the "horizontal completed pyramid method." It is the method that follows from carrying the reasoning of the Board's opinion to its logical conclusion. And it is apparent that under it future taxes for anywhere from ten to eighty-odd years would be affected by the payment of the lessor's tax in one year, depending on the various factors involved in the computation of the tax in each year.

(5) *"The Horizontal Truncated Pyramid Method."*

Apparently because of the absurdity of such a method of computation, the member of the Board before whom the final order in the *Appeal of Providence & Worcester Railroad Company* came for settlement, indicated that in his judgment the horizontal pyramid should be truncated, and he directed that the computation be made in a manner we may call the "horizontal truncated pyramid method," as follows:

The 1917 tax should be regarded as 1918 income and an additional 1918 tax assessed. The 1918 tax should be paid by the lessee as so computed, but only a part of the amount so paid should be added to 1919 income. For the purpose of computing the 1919 tax, the 1918 tax should first be recomputed on the basis of the rent income, without increase for 1917 taxes, and this recomputed 1918 tax (not the tax actually paid) should be added to 1919 income. Similarly, 1920 taxes should be based on 1920 rent income plus a 1919 tax (not that actually paid) recomputed to omit the 1918 tax from 1919 income. And so on.

The truncation of the horizontal pyramid in this manner involves two computations of each year's taxes—on one base for purposes of payment and on

another base for purposes of regarding it as additional income in the next year. Like the truncation of the vertical pyramid, it is based on the thought that an income tax on rent income is additional taxable income, but an income tax on such additional income is not further income. The lack of logic in both of these "truncated pyramid methods" is apparent.

APPENDIX B.

Boston & Maine Railroad *v.* United States.

Opinion of District Court, per Judge Lowell.[*]

This case was selected from several other similar ones to test the question whether the payment of the Federal income tax under a lease which provided for the payment of all taxes by the lessee subjects the lessor to a further tax on the sum of money so paid.

The case was tried on a stipulation of facts, which was essentially a restatement of the plaintiff's declaration. The following statement is taken almost verbatim from that declaration:

On June 30, 1900, the Fitchburg Railroad leased for the term of ninety-nine years all its railroad and property of every description to the Boston & Maine Railroad.

The lessee covenanted to pay all operating expenses of the lessor, including therein all repairs and renewals, all expenditures arising out of any contract, obligation, business, neglect, or misfeasance, or however otherwise arising, in any way connected with the ownership, use or operation of the demised premises, etc., including therein damages to persons or property, insurance, all taxes of every description, Federal, State and municipal, upon the lessor's property, business, indebtedness, income, franchises, or capital stock, or said rental, all expenses consequent upon or incidental to the renewal or refunding of the lessor's indebtedness or that of any road owned, leased, or operated by it, any expenditures hereinafter declared to be operating expenses, all necessary legal expenses of the lessor, and the organization expenses of the lessor.

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[*]Reported at 23 Fed. (2d) 343.

The lessee further covenanted to pay, as the same became due, the rentals of all railroads of which it came into possession or which it should operate under and by virtue of the lease and to pay the interest on the indebtedness of the lessor and on the indebtedness of all roads leased or operated by the lessor, which lessor was under obligation to pay, etc.

As rental for said lease, the lessee agreed to pay on the 1st day of October, 1900, and on the 1st days of each subsequent January, April, July, and October, during the term of the lease, to each holder of the lessor's preferred stock, exclusive of any in the lessor's treasury, $1.25 for every share held by him, and to each holder of the lessor's common stock, exclusive of any in the lessor's treasury, 25 cents for every share held by him, and, in case of any failure so to pay, each shareholder was to have a separate right of action against the lessee for the amount due to him. The lessee also provided the lessor with office accommodations, and paid $7,000 a year to defray its "organization expenses."

For the calendar year 1917, the said Fitchburg Railroad Company was assessed income, war profits and excess profits taxes under the Revenue Acts of 1916 and 1917 upon its income for the said calendar year amounting to $61,422.06 and in 1918 the said taxes were paid by its lessee, the Boston & Maine Railroad.

Thereafter, and on or about the 1st day of December, 1919, the Fitchburg Railroad Company was legally consolidated with the Boston & Maine Railroad, under and by virtue of the laws of the commonwealth of Massachusetts and of the States of Maine, New Hampshire and New York.

On or about the 26th day of February, 1921, the Commissioner of Internal Revenue assessed an ad-

ditional income tax upon the income of the Fitchburg Railroad Company for the calendar year 1917, amounting to the sum of $3,920.55; said assessment purporting to have been made under the Revenue Acts of 1916 and 1917 (39 Stat. 756, 40 Stat. 302) and further purporting to be taxes arising from inclusion by the Commissioner of Internal Revenue in the income of said Fitchburg Railroad Company for the calendar year 1917 of the amount of the taxes previously assessed for the calendar year 1917 upon said income and paid by said lessee, Boston & Maine Railroad, to wit, the amount of $61,422.06.

On or about the 20th day of July, 1921, the Collector of Internal Revenue at Boston, Mass., demanded payment of said additional taxes amounting to $3,920.55 within the period of ten days from date thereof, under threat of the penalties provided by law.

The Boston & Maine Railroad paid the tax under protest, and filed a claim for refund which the Collector of Internal Revenue neither allowed nor rejected, and, after the lapse of six months, the present suit was brought.

If the Government's contention is sound, the Treasury Department has discovered a manner of creating wealth—the age-long search for the philosopher's stone, which would turn into gold whatever it touched, has at last successfully ended. By merely laying the primary tax, the Department thereby creates income, which is subject to a secondary tax; this in turn is further income, which is subject to a tertiary tax; and this in its turn gives rise to a quaternary tax; and so on *ad infinitum*. This result is clearly shown in the opinion of Judge Morton in *U. S.* v. *Norwich & W. R. Co.* (D. C.), 16 Fed. (2d) 944, where a similar situation was pre-

sented, but not decided, as the decision turned on another point. Judge Morton says:

> "If the Government's right to the tax here claimed be sustained, the sum paid for this tax will constitute additional income of the defendant; on that income an additional tax would be assessable; the additional tax, when paid, would constitute further income of the defendant, on which another tax would be assessable; and so on. Counsel agree that, to compute the tax with mathematical precision, resort must be had to calculus. It is said in argument that, on one of the cases which depend on this, the total amount of the tax, if computed according to the Government's contention, will be over 200 per cent of the entire income."

[1] An objection of some force to this form of taxation is that it requires for its computation a complicated algebraic formula. See *U. S.* v. *Norwich & W. R. Co.*, *ubi supra*, *Edwards* v. *Slocum* (C. C. A.), 287 Fed. 651, 654, and *Edwards* v. *Slocum*, 264 U. S. 61, 63, 44 S. Ct. 293, 68 L. Ed. 564. But the Government's answer to this contention seems sound—that, if this be income, difficulty of computation is not a legal hindrance to the collection of a tax thereon.

The plaintiff objects to the tax on the ground that the money used to pay it is not income, as it was never received by the Fitchburg Railroad. This contention is unsound. *West End St. R. Co.* v. *Malley* (C. C. A.), 246 Fed. 625; *Rensselaer & S. R. Co.* v. *Irwin* (C. C. A.), 249 Fed. 726; *Houston Belt & Terminal Ry Co.* v. *U. S.* (C. C. A.), 250 Fed. 1; *U. S.* v. *Western Union Tel. Co.* (D. C.), 19 Fed. (2d) 157, and cases cited.

A more serious criticism is that the only source of income remaining to the Fitchburg Railroad is the

rental paid by the Boston & Maine, and that an income tax, paid as it was in the case at bar, is not regarded as rent. *Guild* v. *Sampson*, 232 Mass. 509, 122 N. E. 712; *Duffy* v. *Central R. Co.*, 268 U. S. 55, 63, 45 S. Ct. 429, 69 L. Ed. 846.

[2] The conclusive answer to the Government's contention, however, seems to be that there is no gain to the Fitchburg Railroad from the transaction. *Goodrich* v. *Edwards*, 255 U. S. 527, 41 S. Ct. 390, 65 L. Ed. 758. See also *Pitney* v. *Duffy* (D. C.), 291 Fed. 621, and *Duffy* v. *Pitney* (C. C. A.), 2 Fed. (2d) 230.

> "'"Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets.' *Eisner* v. *Macomber*, 252 U. S. 189, 207 [40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570]." Clarke, J., in *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509, 518, 41 S. Ct. 386, 388 (65 L. Ed. 751, 15 A. L. R. 1305).

The Fitchburg Railroad gets no gain or profit. It is not made richer by the tax so paid. Its financial situation is the same as when no income tax is laid, and continues the same however high the rate of such taxation may become. The opinion in the *Appeal of the Providence & Worcester R. Co.*, 5 B. T. A. 1186, which decided a question like the present one in favor of the Government, loses sight of this fact.

[3] The tax in the present case is also obnoxious to the cardinal rule that the incidence of a tax should not be considered in levying a tax. *Edwards* v. *Slocum* (C. C. A.), 287 Fed. 651, 655; *Edwards* v. *Slocum*, 264 U. S. 61, 63, 44 S. Ct. 293, 68 L. Ed. 564.

Judgment for plaintiff.

JAN
CHARLES EL

Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 129.

THE UNITED STATES OF AMERICA

vs.

BOSTON & MAINE RAILROAD.

No. 130.

OLD COLONY TRUST COMPANY, *et al.*, EXECUTORS

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR OLD COLONY TRUST COMPANY, *ET AL.*, EXECUTORS.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

THE UNITED STATES OF AMERICA vs. BOSTON & MAINE RAILROAD	No. 129.
OLD COLONY TRUST COMPANY, *et al.*, EXECUTORS, vs. COMMISSIONER OF INTERNAL REVENUE.	No. 130.

BRIEF FOR OLD COLONY TRUST COMPANY, *ET AL.*, EXECUTORS.

Statement of Case.

In these cases the United States Circuit Court of Appeals for the First Circuit has certified a single question of law. This brief is filed by Old Colony Trust Company, *et al.*, Executors, appellants below in No. 130.

The decision of the United States Board of Tax Appeals in No. 130, from which the Old Colony Trust Company, *et al.*, Executors, appealed to the Circuit Court of Appeals, is published as *Old Colony Trust Company and Cornelius A. Wood, Executors of the Will of William M. Wood, deceased,* vs. *Commissioner of Internal Revenue,* 7 B. T. A. 648.

The Circuit Court of Appeals made no decision in the case but certified to this Court the single question of law involved in this case and in the *Boston & Maine Railroad* case. (Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.) The question was certified on May 2, 1928 (Certificate, p. 1), and filed in the United States Supreme Court May 9, 1928 (Certificate, p. 4). The Court has jurisdiction to answer the question.

Lau Ow Bew v. *United States,* 144 U. S. 47.

The facts are set forth in the Certificate (pp. 1 to 3) and in the Government's brief, hence are not repeated here.

Question Certified.

Did the payment by the lessee in No. 2235 (No. 129), or by the employer in No. 2218 (No. 130), of the income taxes assessable against the lessor in the first case, and the employee in the second, constitute additional taxable income to such lessor or to such employee? (Certificate, p. 3).

The Statutes.

The *Boston & Maine Railroad* case arises under the Revenue Act of 1916 (39 Stat. 756) as amended by the Revenue Act of 1917 (40 Stat. 300). The *Old Colony Trust Company* case arises under the Revenue Act of 1918 (40 Stat. 1057). The pertinent provisions of these statutes are set forth in Appendix A.

Taxpayer's Position.

Taxpayers maintain that a contract for payment of income tax at the source is legal and proper; that rent or salary income is not commonly regarded as greater than the amount received, or due, merely because the income tax

upon it is paid by the payor rather than by the recipient of such rent or salary; that the fact that such income is received tax paid does not *inflate* or *increase* the amount of rent or salary received or derived, but merely preserves it intact without diminution; that the benefit derived is reflected in the *retention* of the gross rent or salary received, undiminished by income tax, not by an *addition* to such income; that the *income tax itself* is not commonly regarded as a gain or income which should be subjected to further income tax, merely because it is paid by some one else; that the incidence of the income tax is not considered in computing such tax; that the compounding or pyramiding of the tax resulting from the method of computation employed by the Government shows that the inclusion of the income tax itself in the income subject to tax is not within the general understanding of the term "income".

Income taxes paid at the source were not received constructively or otherwise by the recipient of the income because such taxes were not, could not and never would be received by the taxpayer. Cases holding that rent paid to a third party are income of the property owner are clearly not in point. Income tax is not rent or salary; an agreement to pay rent or salary free from income taxes is not the same as an agreement to pay a larger rent or salary; the rent cases do not involve consideration of the incidence of the tax or compounding of the tax; payment of income tax at the source is not the equivalent of a diversion of part of the rent or salary to a third party; the rent cases turned largely on a disregard of the corporate entity and the fact that the device employed by the lessors in such cases enabled them to evade all income taxes on the rent paid for the use of their property. The holding that rent for corporate property paid to the stockholders and bondholders is income of the corporation is of doubtful validity, has never been passed upon by this Court and, even were these cases analogous, they can not be extended to cover the radically different situation arising in the cases at bar.

ARGUMENT.

Rent or salary income is not commonly regarded as greater than the amount received or due merely because the income tax upon it is paid by the payor instead of by the recipient of the rent or salary, and such income tax itself is not commonly regarded as income.

(a) A contract that the payor of income shall pay the Federal income tax thereon, is a valid contract. Such contracts do not result in any tax evasion.

The shifting of the burden of a tax by contract is entirely legal and proper in the absence of a specific statutory prohibition of such contract.

> *American Express Company* v. *Michigan,* 177 U. S. 404.

The New York Personal Income Tax Law provides that a contract to bear or assume the burden of that tax shall be null and void (Section 385). The Federal Revenue Acts contain no such provision. In considering the 1917 Revenue Act the Senate Finance Committee proposed an amendment under Title XII, Income Tax Amendments, as follows:

> "Seventh. That any contract entered into after this act goes into effect, by which any person or concern agrees to pay any portion of the income tax of any other person or concern, shall be void." (Report of Senate Finance Committee, August 4 (Calendar day August 6), 1917, on H. R. 4280.)

The Congress did not adopt this amendment. On the contrary, it specifically recognized as legal and valid the most common class of such contracts, the tax-free covenants ap-

pearing in corporate bonds (see Section 1205, Revenue Act of 1917; Section 221, Revenue Act of 1918). Contracts that the payor of income should pay the income taxes thereon have long been common in corporate bonds and long term railroad and public utility leases, and there can be no question as to the validity of such contracts. Such contracts do not accomplish an evasion of taxes but give the Government double assurance of collection. The contracts here in question are of this character.

The statutory provisions that income taxes are not deductible from gross income (Sec. 1207(2) Revenue Act of 1917; Section 214(*a*)(3) Revenue Act of 1918) clearly were not intended to invalidate contracts making the income tax payable at the source, and indicate no intention that any taxpayer shall be taxed on more than his gross income. Their effect is merely to prevent the use of the tax itself in computing the income subject to tax.

The contract between the Boston and Maine Railroad and the Fitchburg Railroad was made in 1900 when there was no income tax. The resolution of the American Woolen Co. was adopted in August, 1916, when Federal Income Taxes were relatively unimportant. The Government concedes there was no intent to evade income taxes in either case.

If a contract for the shifting of the burden of the income tax from the recipient to the payor of the income gives rise to no additional income, as taxpayers maintain, no evasion of tax in fact results from recognizing the validity and effect of such contracts. If it is thought that the recognition of such contracts permits recipients of income legally to avoid some desired tax liability, the remedy lies in legislative prohibition of such contracts, a step which Congress considered but decided not to take.

(b) In common understanding income taxes paid by the payor of income neither increase such income nor constitute additional income.

The statutes under consideration contain no specific provision with respect to income taxes paid on salary or rent by the payor of such items but merely define "income" as including "gains, profits and income derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid * * * rent * * * or gains or profits and income from any source whatever". Sec. 2(*a*) Revenue Act of 1916; Sec. 213(*a*) Revenue Act of 1918.

In common understanding the full rent for 1917 received by the Fitchburg Railroad Company (the lessor in No. 129) for the use of its property, was the $1,023,701 which it actually received from the Boston and Maine, free and clear and subject to its control. The income tax of $61,422.06 stated in the certificate is 6% of $1,023,701. The rent of $1,023,701 was something of exchangeable value proceeding from the lessor's property, and received or drawn by it for its separate use, benefit and disposal. The payment of the income tax on the rent by the lessee did not increase the income of the lessor but merely left it unchanged. The income of the lessor from the lease was no greater when there was an income tax than before the income tax was imposed, and did not fluctuate from year to year as income tax rates were changed by Congress. The sole effect of the agreement by the Boston & Maine Railroad to pay the lessor's income tax on such rent was to enable the lessor to retain intact the entire rent of $1,023,701 received. The lessor did not pay a 6% income tax on this amount because the lessee had agreed to pay it, but the avoidance of this loss or expense did not increase its gain derived by $61,422.06 (6% of $1,023,701), or by $65,342.61 (the amount added to income by the Government, which is 6% of 100/94ths of $1,023,701),

or by any other amount. The benefit or advantage derived is fully reflected in the gross income received and retained. Taxpayer's advantage is that his gross income is not reduced by the income tax payment, not that his gross income is increased by the income tax payment. The avoidance of a loss or expense merely operates to preserve, not to increase income. A measure taken to prevent the diminution of the income received does not have the effect of increasing such income. A penny saved is not the legal equivalent of an additional penny earned. A saving of outgo is not an increase in income.

The salary of Mr. Wood in No. 130 upon which his employer paid the income tax did not thereby become a greater salary any more than a salary exempt from State or Federal income tax is inflated by the amount of the tax saving. No one would contend that a Federal employee residing in New York and exempt from New York income tax on his Federal salary, should on that account be subjected to a Federal income tax on something more than his salary. Nor does any one suggest that a Federal Judge, exempt from both Federal and State income tax on his salary (*Miles* v. *Graham,* 268 U. S. 501) derives income from his services in excess of his salary because of such exemption from tax. The fact that such salary cannot be diminished by an income tax does not mean that the salary is increased by the amount of tax which would have been imposed on some one else not so favorably situated. When there is a 10% income tax, there is certainly no common understanding that $100 of exempt or tax paid salary received represents either $110 or $111.11 of income.

Interest income from a bond is the amount of the coupon which is cashed, whether the bond is a municipal bond, the interest on which is exempt from income tax, or a tax-free covenant bond, where part of the income tax on the interest is paid at the source, or an ordinary bond, the interest on which is subject to the full income tax. It is settled that the interest received on a tax-free covenant bond is no greater

in amount because part of the income tax liability on such interest is paid at the source by the obligor corporation, and that the tax so paid is not additional income to the recipient of the interest.

Duffy v. *Pitney*, 2 F. (2d) 230. Certiorari denied, 267 U. S. 595.

In the case cited the Circuit Court of Appeals for the Third Circuit held that the part of the bondholder's income tax paid at the source by the corporate obligor of a tax-free covenant bond was not income to the bondholder, and said:

> "Applying the customary canons of construction to this tax legislation (Spreckles Sugar Co. *v.* McClain Collector, 192 U. S. 397, 24 S. Ct. 376, 48 L. Ed. 496; Gould *v.* Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211), we do not believe in such case that the sum withheld at the source is income. It does not fall within any accepted definition of the term. Eisner *v.* Macomber, 252 U. S. 189, 207, 40 S. Ct. 189, 64 L. Ed. 521, 528, 9 A. L. R. 1570, 1577. It is not a 'gain' or 'profit' derived from any of the sources named in the statute (Section 213), nor (whatever it is) has it ever been 'received' by the taxable. It is not property nor is it a right to property for, not being payable to the obligee, he cannot recover it in an action at law against the obligor. In its effect upon the obligee it is at most an intangible but very real advantage for which he has contracted and as a result of which a part of his taxes is paid by another. In thus contracting for the payment of a part of his tax by another the taxable in this case did only what Congress expressly permitted him to do. Therefore his conduct was lawful and was in no sense an evasion of the payment of taxes or an obstruction to the collection of taxes, as in some cases relied upon by the defendants. Houston Belt & Terminal Railway Co. *v.* United States, 250 F. 1, 162 C. C. A. 173; Blalock *v.* Georgia Railway & Electric Co., 246 F. 387, 158 C. C. A. 451; Rensselaer & Saratoga Railroad Co. *v.* Irwin (D. C.) 239 F. 739; Id. 249 F. 726, 161 C. C. A. 636. We are of opinion, therefore, that the sum withheld at the source in obedience to the statute is a tax. The best authority for this is the statute itself, and the statute

calls it a 'tax'. Being a tax, we cannot find that the Revenue Act requires that it be included in a return as 'income' and that the act intends thus to impose a tax upon income and also a tax upon a tax."

This case is squarely in point here, and is followed by the Treasury Department, the Board of Tax Appeals and the Courts, and is not questioned by the Government in its brief in this case.

Treasury Decisions 3685, C. B. IV-1, p. 121;
Appeal of Mary Clark Kling, 1 B. T. A. 1048;
Geo. D. Horst v. *United States, No. E-89, Ct. of Cl.*, Jan. 16, 1928;
Jno. D. Horst v. *United States, No. E-90, Ct. of Cl.*, Jan. 16, 1928.

The Government attempts to distinguish *Duffy* v. *Pitney, supra,* on the ground that there the obligor was discharging a statutory duty and in effect paying its own income tax (Government's brief, p. 16). *It is obvious however that the tax paid by the obligor under a covenant to pay bond interest without deduction for income taxes, is the income tax of the bondholder, not of the obligor.* By the statute the bondholder is allowed to take credit for such payment as a part payment of his income tax and the obligor is not required to pay the tax unless the bondholder is subject to tax. The statute certainly does not attempt to impose an income tax on the obligor measured not by its income but by the bond interest paid out. Any such income tax would be invalid.

Section 221, Revenue Act of 1918, Appendix A, p. 31 hereof.
Law Opinion 1107, C. B. I-2, p. 223.
G. C. M. 1710, C. B. VI-1, p. 145.
Frew v. *Bowers*, 12 F. (2d) 625.

See *Union Pacific R. Co.* v. *Bowers*, 28 F. (2d) 370, expressly holding that the bondholder and not the obligor is the taxpayer in such a case.

In the cases at bar as in *Duffy* v. *Pitney, supra*, the contract was valid and enforceable and the conduct of the parties was lawful. *The express statutory recognition of the tax-free covenant in corporate bonds adds nothing to their validity and does not change in any respect the character or effect of the benefit derived by the recipient of the income. The fact that the obligor was discharging a statutory duty and was not allowed to deduct the tax paid at the source by it, had absolutely no effect on the nature or taxability of the benefit derived from the transaction by the bondholder.* The provision of the Revenue Act of 1921 that the tax paid at the source was not income of the obligee could not, of course, directly affect the decision in *Duffy* v. *Pitney* which arose under the Revenue Act of 1918, which was silent upon the question. Such provision of the 1921 Act indicates that Congress did not consider the income tax paid at the source as giving rise to any benefit to the recipient of the tax paid income, which should be treated as additional income. The Government has wholly failed to distinguish *Duffy* v. *Pitney, supra*. That decision is squarely in point and its correctness is not questioned.

It is not sufficient to say, as the Government does in its brief, that the income taxes in question were paid by the lessee as part of the consideration for the use of the leased property or by the employer on account of services. The tax paid at the source by the obligor of a tax-free covenant bond was not treated as income of the bondholder though unquestionably, so far as the obligor was concerned, it was an additional payment for the use of the bondholder's money. The question is not as to the motive or reason for the making of the income tax payments to the tax collector by the lessee or employer but whether the lessor and employee received *income* by reason of such payments. That such income tax payments were

not received by the taxpayers "constructively" or otherwise, is shown elsewhere in this brief (*infra*, p. 26). What we contend here is that the income taxes paid to the Government were not income, salary or rent to the taxpayers in the ordinary sense and common understanding of those terms.

It is, of course, well settled that the general term "income" used in the statute must be construed in the ordinary sense of the word as used in common speech, and the question here presented must be decided on the basis of the common understanding as to what constitutes income and is usually classed as such.

Eisner v. *Macomber*, 252 U. S. 189.
Lynch v. *Hornby*, 247 U. S. 339.
United States v. *Supplee-Biddle Hardware Company*, 265 U. S. 189.
The Merchants Loan & Trust Company v. *Smietanka*, 255 U. S. 509.

The terms "rent" and "salary" used in the statute must likewise carry their ordinary sense and meaning. The statutory definition of income as including "gains, profits and income derived from salaries, wages, or compensation for personal services of whatever kind or in whatever form paid", merely states the general understanding of the term, was not intended to include in taxable income something not generally regarded as income, or salary or wages, and could not be effective to tax as income something not commonly regarded as income.

Eisner v. *Macomber, supra.*

The taxpayer, of course, derives a benefit from having the income tax on the rent or salary paid by another, but it is clear that benefits are not necessarily income.

Eisner v. *Macomber*, 252 U. S. 189.
Baldwin Locomotive Works v. *McCoach*, 221 Fed. 59.
Gould v. *Gould*, 245 U. S. 151.

Solicitor's opinion 132, C. B. I-1, p. 92.
Treasury Decision 2747.
Edwards v. *Cuba Railroad*, 268 U. S. 628.
Appeal of Liberty Light & Power Company, 4 B. T. A. 155.
Appeal of Great Northern Railway Company, 8 B. T. A. 225.
Jones v. *United States*, 60 Ct. Cl. 552.
Bowers v. *Kerbaugh Empire Company*, 271 U. S. 170.

Life insurance received by a corporation on the death of an officer is not income because not "usually classed as income".

United States v. *Supplee-Biddle Hardware Company*, 265 U. S. 189.

There is no income where corporations avoid payment of the face amount of bonds by purchasing such bonds at less than face value.

Appeal of Independent Brewing Company, 4 B. T. A. 870.
Appeal of New Orleans, Texas & Mexico Railroad Company, 6 B. T. A. 436.
Appeal of Houston Belt & Terminal Company, 6 B. T. A. 1364.
Appeal of National Sugar Manufacturing Company, 7 B. T. A. 577.
Appeal of Meyer Jewelry Company, 3 B. T. A. 1319.
Solicitor's Memorandum 1495, C. B. III-1, p. 108.

It is clear from these cases that the mere fact that a taxpayer avoids payment of a debt or liability, or is otherwise benefited, does not necessarily mean that he has derived taxable income. It must also appear that the taxpayer received or derived a gain from the transaction which is commonly regarded as income. And the benefit derived by the lessor or employee from having the income tax paid at the source is not commonly regarded as income.

It is true that in many cases the payment of an employee's debt by an employer may be income to the employee. This may be true of pre-existing debts, or debts arising out of extraneous transactions. But in the cases at bar the recipient does not secure the payment of a pre-existing and extraneous debt, payable whether he received the income or not; he merely avoids paying out part of the income received to satisfy the income tax liability on such salary, a liability which he would not have incurred but for the receipt of such salary. He does not avoid payment of a debt representing money, or food, or some other positive benefit received or to be received by him; he merely stipulates that he shall not have to pay a charge incident to the receipt of the income which, when paid, represents no positive benefit to him at any time. He merely arranges to retain the full income upon which the tax is paid. The benefit or advantage which the employee derives from such a transaction does not represent any gain commonly classed and regarded as income.

(c) The incidence of a tax is not considered in measuring that tax.

In the cases at bar the Government has added the income tax payable by the lessee and employer to the income received by the taxpayers and has thus imposed an income tax on the income tax itself. The fact that a tax on a tax is imposed is not changed by claiming that such tax is income. *The government has, in these cases, increased the income subject to tax merely because the burden of such tax is shifted by a valid contract to the payor of the income.*

It is established by this Court that the incidence of the tax, *i. e.*, where the burden of payment falls, is not to be considered in determining the measure of such tax. Tax statutes are normally construed in such a way that the measure of the tax is first determined, and the tax thereon is then computed by simple arithmetic. The mind instinctively rejects

the complicated idea of taking into account the amount of the very tax which is to be determined as a part of the measure by which such tax is to be computed, or of considering the effect of the payment of the tax in computing it.

This principle is set forth in *Edwards* v. *Slocum*, 264 U. S. 61. The estate tax law provided that gifts to charities were deductible in determining the net estate. In this case the residuary estate was given to charity, and under the terms of the will and the State law, the Federal estate tax was payable out of the residuary estate. The executors claimed the right to deduct from the gross estate as a gift to charities the amount of the residuary estate as computed before payment of the Federal estate tax. The Government contended that only the amount which would actually be received by the charities, the residuary estate less the Federal estate tax, could be deducted. Rejecting the Government's contention, this Court said:

> "It [the statute] levies a sum equal to a certain percentage of the value of the net estate, and provides the criteria by which the net estate shall be ascertained. It thus manifestly assumes that the net estate will be ascertained before the tax is computed. The Government offers an algebraic formula by which it would solve the problems raised by two mutually dependent indeterminates. It fairly might be answered, as said by the Circuit Court of Appeals, that 'algebraic formulae are not lightly to be imputed to legislators,' but it appears to us that the structure of the statute is sufficient to exclude the imputation. As further remarked below, the theory departs from the long established practice of the law not to regard the incidence of a tax in the levying of a tax, * * *."

In the Circuit Court of Appeals in the same case, the Court said:

> "History, so far as we can discover shows no other instance of attempting to measure a tax *pro tanto* by itself" (287 Fed. 651).

The fact that the burden of the tax falls on the charitable bequest because of an express provision of the will, an act of the testator, does not change the rule.

Clark v. *United States,* 27 Fed. (2d) 887.

The Treasury Department and the Courts have recognized that the manufacturer may shift the burden of a sales tax measured by selling price, without increasing the measure of the tax, if he clearly indicates that he is billing the customer for the tax and is not merely increasing the selling price, although there is some disagreement as to how far the seller must go to bring himself within this rule.

Article 8, Regulations 52.

Clicquot Club v. *United States,* 13 F. (2d) 655.

White Rock Mineral Springs Co. v. *Edwards,* 23 F. (2d) 539.

Elmer Candy Co. v. *Fauntleroy,* 24 F. (2d) 95, Certiorari granted 72 L. Ed. 682.

Lash Products Co. v. *United States,* D-412, Ct. Cl., November 7, 1927, certiorari granted 72 L. Ed. 682.

By the weight of authority and practice, state inheritance taxes are computed without reference to the incidence of the tax, and a provision of the will, or local law, that all inheritance taxes shall be paid out of the residue, does not, for tax purposes, increase the specific legacies or reduce the residue.

Matter of Estate of Swift, 137 N. Y. 77.

People v. *McCormick,* 327 Ill. 547.

Gleason & Otis, Inheritance Taxes, 1922, p. 87.

The Government discusses the leading case of *Matter of Estate of Swift, supra,* in its brief (p. 17), but, we submit, wholly misapprehends the decision. The Government quotes from Judge Gray's opinion, in which he stated that the tax was a tax on property and not on the legatee, but fails to

note that the majority of the court did not agree with Judge Gray on this point, as is shown by the last few paragraphs of the opinion. However, it is the court's decision on the effect of a provision that all inheritance taxes should be paid out of the residuary estate, which is of importance here. As to this the court said (p. 87):

> "The appraiser, in ascertaining the value of the residuary estate for the purpose of taxation, deducted the amount of the tax to be assessed on prior legacies. The surrogate overruled him in this, and held that there should be no deduction from the value of the residuary estate of the amount of the tax to be assessed, either upon prior legacies, or upon its value. He held that the legacies taxable should be reported, irrespective of the provision of the will, and that a mode of payment of the succession tax prescribed by will is something with which the statute is not concerned. I am satisfied with his reasoning and can add nothing to its force."

This portion of Judge Gray's opinion was the decision of the court. This is an express decision, made in 1893, that in determining the value of legacies for collateral inheritance tax purposes the incidence of the tax is not to be taken into account, and this, we understand, has generally been recognized as the law.

Two recent decisions are the only authorities to the contrary:

In re Irwin's Etate, 196 Cal. 366 (1925).
In re Levalley's Estate, 191 Wis. 356 (1926).

The reasoning of the California and Wisconsin courts is directly opposed to the reasoning of this Court in *Edwards* v. *Slocum.* No authorities are cited in support of the decisions, and the decisions are opposed to the long established practice. The fact that it was not until 1925 that any court took the position that the incidence of the inheritance tax affected the amount of the taxable legacies is persuasive evidence that such a principle is contrary to common under-

standing. Ordinarily the courts assume, without discussion, that the incidence of the tax does not affect the computation.

In re Frick's Estate, 277 Pa. 242; 121 Atl. 35. Reversed in part in *Frick* v. *Pa.,* 268 U. S. 473.

In re Lea's Estate, 194 Pa. St. 524; 45 Atl. 337.

Isham v. *New York Association for the Poor,* 177 N. Y. 218.

Dugan v. *Miles,* 276 Fed. 401.

The position taken by the Government in this case is directly opposed to the settled principle that the incidence of the tax does not affect the measure or amount of the tax.

(d) The compounding or pyramiding of the tax which results from the logical application of the Government's theory shows that the result of such theory is not within the common understanding of income.

The Government's theory that the initial income tax paid at the source is additional income upon which a further income tax is payable, necessarily involves the conclusion that the second tax, if payable by the payor of the income, is also additional income subject to a further income tax, and so on *ad infinitum.* It is not correct to say, as the Government does in its brief, that taxpayers are objecting that they are not taxed enough. Taxpayers are objecting to being taxed at all on a construction of the term "income" which leads to such startling and unusual results as to show that no part of the income tax paid at the source falls within the common and general understanding of the term "income".

The Government seeks to avoid the undoubted force of this argument on the ground that the certificate does not raise the question. The certificate in the *Boston & Maine* case, however, does clearly raise this question. The certificate states, at page 2:

> "In 1918 an income tax return, under the provisions of the Revenue Acts of 1916 and 1917, was filed on

behalf of the Fitchburg Railroad Company for the calendar year 1917 upon which taxes amounting to $61,422.06 were assessed. These taxes were paid to the Commissioner of Internal Revenue by the Boston & Maine Railroad pursuant to the terms of the lease. * * *

In 1921 the Commissioner of Internal Revenue assessed an additional income tax against the Fitchburg Railroad Company of $3,920.55. In doing this he treated the payment of $61,422.06 made by the Boston & Maine Railroad to the Collector of Internal Revenue as additional taxable income to the Fitchburg Railroad Company to the extent of $65,342.61."

The corporate income tax rate in 1917 was 6%. The Commissioner did not merely treat the initial income tax of $61,422.06 as additional income of the lessor and assess a tax of $3,685.32 (6% thereof), as the Government appears to imply in its brief; he treated the payment of $61,422.06 as additional income to the extent of $65,342.61 and assessed an additional tax of $3,920.55 (6% thereof). These figures are comprehensible only if it is explained, as the Government does in its brief (p. 26), that the tax computed is 6% of 100/94ths of $61,422.06. In the *Boston & Maine* case the Government carried its theory to its ultimate limits. It treated as accrued income of 1917, not only the primary income tax of $61,422.06, but a secondary income tax of $3,685.32, and a tertiary income tax of $221.12, and so forth, until the total of $65,342.61 added to income was accumulated (see Government's brief, p. 27). The question of compounding the income tax thus arises directly on the face of the certificate in the *Boston & Maine* case.

This question does not arise directly in No. 130 because the taxpayer there was on a cash receipts and disbursements basis, so that the question of taxing the secondary tax will not arise unless and until such secondary tax is actually paid by the employer. But the question is of direct importance in No. 130 because every reason which the Government is now urging in support of its ruling that the primary income tax paid by the employer is income of the employee, will apply

with equal force to support a claim that the secondary, tertiary, etc., income taxes, when paid by the employer, will be income to the employee.

In both cases the Government has taxed the maximum amount possible under the system of accounting employed by the respective taxpayers.

The startling and unusual results of the Government's theory as actually applied in the *Boston & Maine* case, and for the application of which this case will be a controlling precedent, if decided in favor of the Government, appear from the following:

If the Government's theory is sound it must apply not only to the simple case of a 6% income tax, but also to cases subject to the more complicated excess profits tax provisions of the Revenue Acts of 1917, 1918 and 1921, and to the cases of individuals subject to progressive surtaxes, as well as normal taxes, under all of the Revenue Acts.

If the Fitchburg Railroad Company had an invested capital for 1917 of but $2,000,000 and received annual rent of $1,023,701, its total tax under the taxpayer's theory, based on the income of $1,023,701, would be $416,385.42. The total tax on the Government's theory would be the astounding figure of $1,107,408.04, based on a theoretical income of $2,131,-109.03. This tax under the Government's theory can be computed arithmetically by a series of tax computations (39 in this case) in each of which the tax shown by the previous computation is added to the actual income. Or the tax can be computed, in some cases, by resolving a formula, in which X equals the tax and X plus the actual income equals the theoretical income (see Appendix B for details). The Government's formula, computing the tax at 6% of 100/94ths of the income, can, of course, be used only in the simple case of a flat income tax rate.

In the case of an individual reporting on the accrual basis and receiving a salary of $1,000,000 for 1918, upon which the employer had agreed to pay all income taxes, the tax, on the taxpayer's theory, would be $703,150 on a net income of

$1,000,000, and the tax, on the Government's theory, would be $3,057,173.91 based on a theoretical net income of $4,057,173.91 (see Appendix C for details). In this case the tax would be more than three times the tax paid income.

If the income tax payable by another accrues when it becomes payable in the year following the accrual of the income, the details of the computation are different but the compounding of the tax remains. If, for example, it should be held that the tax on the 1917 income of the lessor was accrued income for the year 1918 when it became payable (see *Appeal of Providence & Worcester Railroad*, 5 B. T. A. 1186), the primary tax would be accrued income for 1918, the secondary tax would be accrued income for 1919, and this process would continue for a series of years until the last compounding of the tax was less than half a cent. Each year's rent would start such a series in operation, and to get the accumulated theoretical income for any year it would be necessary to consider the annual rent and the compounding of the tax thereon under various tax laws for a long series of prior years (see Appendix D for details).

The same result would follow in the case of a taxpayer computing income on a cash basis, as in the *Old Colony* case, except that here the income tax paid by the employer would only become income in the year when actually paid, so that in case of delayed payments the final compounding of the tax would spread out over a somewhat longer period.

The Government has not conceded that its computation in the *Boston & Maine* case was wrong and does not take the position that it should have collected an additional tax of but $3,685.32 (6% of the initial tax of $61,422.06) instead of the tax of $3,920.55 which it actually collected and seeks to retain. The Government's brief, however, is based on the assumption that no attempt has been made to collect further taxes upon the theory that the payment of additional taxes creates further income and maintains that

> "the Treasury Department is not fairly to be censured if it fails to apply its theory literally in order to avoid absurd consequences" (p. 21).

In making this statement the Government apparently recognizes that literal application of this construction may lead to results which are absurd.

If the logical application of the Government's theory leads to results which are manifestly absurd, that shows that the theory is wrong, and hence such theory furnishes no proper basis for the collection of any additional tax. The use of a theory leading to absurd results is not to be defended by the suggestion that in practice the Treasury will not press the theory too far.

The Government maintains that any compounding of the tax results from the contract of the parties, rather than from the Government's theory. *The mathematical difficulty, however, is inherent in and characteristic of the principle of considering the incidence of the tax in measuring the tax.* The argument was made in *Edwards* v. *Slocum* that the mathematical difficulties existing there did not result from the provisions of the law but from the provisions of the testatrix's will. As to this the Circuit Court of Appeals said (287 Fed. 654):

> "It is next observable that this using of tax to measure tax will only happen when the residuary estate, or some part of it, is devoted to charity or other deductible purpose. If this testatrix had made her charitable bequests before inserting a residuary clause, no difficulty would have arisen. It is argued with apparent seriousness that this is 'something for which the testatrix is responsible,' which is true only if the law laid such a trap as this for charitable residuary legatees, as distinguished from equally charitable general legatees—again something not lightly imputable to the lawgiver."

See also *Clark* v. *United States*, 27 F. (2d) 887.

There is no way in which the parties could have framed a contract which would accomplish the entirely proper result of assuring a fixed rent or salary free from diminution by possible income taxes, which would not, under the Government's theory, involve compounding of the tax. The Government's suggestion that the question of compounding

would not arise if the lease had provided for the payment of $61,422.06 to cover the 1917 income tax of the lessor, does not take care of the situation. If this amount was additional income the lessor would have to pay a tax of $3,685.32 thereon and would either net that much less than the parties intended by their contract or, if the lessee agreed to pay such tax, the precise question at issue would arise. If the lessee and Mr. Wood had included the initial income tax payments in their original returns for the years involved, the lessee and employer would have to pay the secondary income taxes thereon and the question of compounding would immediately arise. The Government has indicated no method by which the parties could contract for a fixed rent or salary free from diminution by possible future income taxes or increases in income tax rates which would not give rise to a compounding of the tax if the Government's theory is to be adopted that the incidence of the tax affects the measure of the tax. The unusual results of the Government's theory therefore cannot be justified on any ground that the parties are responsible for such results because they should have foreseen that the Government would depart from the long established usage of not regarding the incidence of a tax in determining its amount, and should have framed their agreements so that the lessor or employee would bear some part of the tax burden and thus avoid the compounding resulting from the Government's theory.

The fact that the Government's theory leads to this compounding of tax and to startlingly large taxes in normal cases, is highly significant as indicating that the amounts produced by the Government's method of computation are not within the ordinary concepts of income. The force of this argument rests not so much on the fact that the Government's computation in many cases requires the use of complex and involved mathematics, as it does on the consideration that the result, computed in this complicated way, produces an amount which would not be considered income within the ordinary usual general understanding of that term.

(e) The income tax paid at the source is not constructively received by the recipient of the income. Cases holding that rent paid to a third party at the lessor's direction, is income of the lessor, turn on facts and reasons not present in the case at bar.

The Government contends that the agreements of the lessee and employer to pay the rent or salary free from income tax were in effect agreements to pay the amount of the income taxes as additional rent or salary, that if such amounts had been paid to the lessor or employee as rent or salary, they would clearly be taxable income, and that taxpayers must account for such additional rent or salary income just as if in fact received, since such amounts were paid out to a creditor of the taxpayers at their direction. In support of this contention the Government cites cases holding that *rent* paid to a third party at the lessor's direction is income of the lessor.

Hamilton v. *Kentucky & I. Terminal Co.* 289 Fed. 20.

West End Street Railway Company v. *Malley*, 246 Fed. 625 (1917); certiorari denied 246 U. S. 671.

Rensselaer & Saratoga Railroad v. *Irwin*, 249 Fed. 726 (1918).

Northern R. Co. of New Jersey v. *Lowe*, 250 Fed. 856 (1918).

Houston Belt & Terminal Company v. *United States*, 250 Fed. 1 (1918).

Blalock v. *Georgia Railway etc. Company*, 246 Fed. 387 (1917).

American Telegraph & Cable Co. v. *U. S.*, 61 Ct. Cl. 326 (1926).

United States v. *Western Union Telegraph Co.*, 19 F. (2d) 157 (1926).

The Government also cites *Appeal of Providence & Worcester R. R. Co.* 5 B. T. A. 1186, the decision of the Board of Tax Appeals upon which its decision in No. 130 below was based.

The Government's contention is unsound as applied to this case and the cases cited are clearly distinguishable for the following reasons:

This contention of the Government was rejected in *Duffy* v. *Pitney, supra.* There the Government contended that the tax paid at the source by the obligor on a tax-free covenant bond should be treated as additional interest on the bond, paid for the use of the bondholder's money, and paid to satisfy the bondholder's tax liability. These same lessor-lessee cases were relied upon, but the Court decided against the Government and that decision is now generally accepted.

The amounts here in question are income taxes and not rent or salary income. The lessee did not agree to pay an increased rent if an income tax was imposed. It agreed to pay the same rent for all years, and to pay any income taxes which might be imposed thereon, a very different arrangement. The lessor demanded a fixed rent, which should be free from reduction by income taxes, and the arrangement made was the only practicable arrangement to assure this proper result. The same was true of the tax paid salary contract. The agreement was not to pay a larger salary, but to pay the income taxes so that the employees would "receive their salaries in full without deduction on account of income taxes." The parties properly and correctly called the amounts in question income taxes, and such amounts were paid to and received by the Government as income taxes. Since these amounts are correctly described as income taxes they cannot properly be treated as rent or salary. The question is not whether rent paid to a third party at the direction of the lessor is income to the lessor, which was the question decided in the cases cited, but the question is whether income tax paid at the source by the payor of the income is income of the

taxpayer, which was the question decided against the Government in *Duffy* v. *Pitney*.

An agreement by the lessee to pay to the Government any income tax on the rent is fundamentally different from an agreement by the lessee to pay the rent to stockholders or bondholders of the lessor because the tax agreement shifts the burden of the income tax from the lessor to the lessee. It is only in such a case that there comes into play the long established principle that the measure of the tax is not affected by its incidence. It is only in such a case that the Government's theory leads to a compounding of the tax. The lessor-lessee cases cited did not, of course, involve this question at all.

The cases at bar do not involve the payment of salary or rent which would normally be payable to the taxpayer in any event, but are paid with his consent direct to his nominee. These cases involve income taxes, amounts which are never payable to the lessor or employee under any circumstances, which are payable at all only when and to the extent that an income tax is levied, and which are payable, in any event, only to the tax collector. This is a radically different situation from an assignment or diversion of amounts which would normally come to the taxpayer as income.

In the cases cited the courts relied very largely on a disregard of the corporate entity. With respect to dividends they held that the stockholders were the real beneficiaries of the corporate activities, and that the receipt of income by the stockholders, representing rent for the use of the corporate property, was equivalent to the receipt of such income by the corporation, which was merely a fictitious person representing the stockholders. No such consideration, of course, is involved in the cases at bar.

In the cases cited the courts took the view that the provision for payment of the rent direct to the stockholders and bondholders of the lessor was an improper evasion of the lessor's income tax due on the rent, recognized by every one as the income of the owner of the rented property. In the

cases cited the Government would have collected no income tax at all on the rent if the lessors were allowed to divert the rent for their property to their stockholders and bondholders and the corporate income tax in all such cases could have been completely evaded. Here the full income taxes on the entire rent and salary received by the lessor and employee are paid to the Government and the full amount ordinarily regarded as rent or salary income has been taxed, but the Government seeks an additional tax merely because the burden of the income tax has been shifted to the lessee and employer, by an entirely legal and proper contract.

The question decided in the cited cases has never been passed upon by the this Court. The decisions discussing the merits of the question and not merely following precedent, were made before this Court formulated its comprehensive definition of "income" in *Eisner* v. *Macomber*. In two cases there were strong dissents, 216 Fed. 83, and 246 Fed. 625. There is much ground for doubting whether the interest and dividends paid by the lessee to the bondholders and stockholders of the lessor constituted gains drawn or derived by the lessor for its separate use, benefit and disposal within the definition of income in *Eisner* v. *Macomber*.

The Government seeks to use the lessor-lessee cases cited as establishing some general doctrine that an amount paid out by the lessee for the benefit of the lessor, is constructively received by the lessor, and therefore income. *We deny that the income tax payments in question were ever constructively received by the taxpayers, or that such items were income.* The true doctrine of constructive receipt in that income shall be treated as received when the taxpayer has unconditional and unqualified power to reduce such income to immediate possession.

Articles 51 and 52 of Regulations 45.

Ordinarily, such doctrine is important only as determining when a taxpayer reporting on the cash basis must report income. The taxpayers here obviously never had power to reduce the income tax payments to their possession.

In these cases the taxpayers did not, in fact, receive the amount of the income tax paid at the source, and this is an important consideration indicating that such tax is not income. We further maintain that income tax payable at the source, pursuant to a contract, or a statutory obligation, is not commonly regarded as income, whether paid direct to the Collector by the payor, or paid by the taxpayer, who is reimbursed by the payor. The fact that the payor reimburses the taxpayer instead of carrying out his obligation to pay the tax direct, in no way changes the nature of the benefit derived by the taxpayer. The mere fact that in such a case the taxpayer receives the amount of the income tax is not decisive. Not every item received is income. Alimony, life insurance, capital contributions, and return of capital, are not income though actually received.

Gould v. *Gould*, 245 U. S. 151.
United States v. *Supplee-Biddle Hardware Company*, 265 U. S. 189.
Edwards v. *Cuba Railroad*, 268 U. S. 628.
Doyle v. *Mitchell Bros.*, 247 U. S. 179.

The important question in every case is whether the benefit or advantage, or gain, actually derived from a transaction is commonly regarded as income. That question cannot be determined merely by considering whether the taxpayer received certain money, whether constructively or actually.

The lessor-lessee cases cited did not hold that the rent was income to the lessor because it was constructively received. They held that such rent was income to the lessor even though it was not received, or to be received by it, because the lessor derived a gain from the transaction which was normally and usually regarded as income to it. Our position here is that the benefit derived by the taxpayers from receiving rent or salary tax paid is not commonly regarded as yielding any income in excess of the rent or salary received, not because the taxpayer did not actually derive a benefit or advantage, but because the benefit actually derived

under such circumstances is not commonly regarded or usually classed as income. Retaining income undiminished by an income tax is not the same thing as receiving more income.

(f) Principles of construction applicable.

In case of doubt, taxing statutes are construed most strongly against the Government and in favor of the citizen.

Gould v. *Gould,* 245 U. S. 151;
U. S. v. *Merriam,* 263 U. S. 179.

The plain, obvious and rational meaning of a statute is always to be preferred.

Lynch v. *Allworth Stephens Co.,* 267 U. S. 364.

(g) Conclusion.

The question certified should be answered "No".

Respectfully submitted,

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APPENDIX A.

The Statutes.

Revenue Act of 1916 (39 Stat. 756) as amended by Revenue Act of 1917 (40 Stat. 300).

(1) Section 2(*a*) as amended by Section 1200, Revenue Act of 1917:

> "(*a*) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

(2) Section 9(*c*) as amended by Section 1205, Revenue Act of 1917:

> "(*c*) The amount of the normal tax hereinbefore imposed shall also be deducted and withheld from fixed or determinable annual or periodical gains, profits and income derived from interest upon bonds and mortgages, or deeds of trust or other similar obligations of corporations, joint-stock companies, associations, and insurance companies, (if such bonds, mortgages, or other obligations contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by this title upon the obligee or to reimburse the obligee for any portion of the tax or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon or to retain therefrom under any law of the United States) whether payable annually or at shorter or longer periods and whether such interest is payable to a non-resident alien individual or

to an individual citizen or resident of the United States, subject to the provisions of the foregoing subdivision (*b*) of this section requiring the tax to be withheld at the source and deducted from annual income and returned and paid to the Government, unless the person entitled to receive such interest shall file with the withholding agent, on or before February first, a signed notice in writing claiming the benefit of an exemption under section seven of this Title."

(3) Section 12(*a*) Fourth, as amended by Section 1207, Revenue Act of 1917:

"Section 12(*a*). In the case of a corporation, joint stock company or association or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources— * * *.

Fourth. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes), or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits."

Revenue Act of 1918 (40 Stat. 1057).

(1) Section 213(*a*).

"Sec. 213. For the purposes of this title, except as otherwise provided in section 233:

"(*a*) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the

ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (*b*) of section 212, any such amounts are to be properly accounted for as of a different period."

(2) Section 214(*a*).

"In computing net income there shall be allowed as deductions: * * *

(3) Taxes paid or accrued within the taxable year imposed (*a*) by the authority of the United States, except income, war-profits and excess-profits taxes; or (*b*) by the authority of any of its possessions, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (*c*) by the authority of any State or Territory, or any county, school district, municipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed; or (*d*) in the case of a citizen or resident of the United States, by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (*e*) in the case of a nonresident alien individual, by the authority of any foreign country (except income, war-profits and excess-profits taxes, and taxes assessed against local benefits of a kind tending to increase the value of the property assessed), upon property or business;"

(3) Section 221(*b*).

"(*b*) In any case where bonds, mortgages, or deeds of trust, or other similar obligations of a corporation contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by this title upon the obligee, or to reimburse the obligee for any portion of the tax, or to pay the interest without deduction for any tax which the obligor may be required

or permitted to pay thereon, or to retain therefrom under any law of the United States, the obligor shall deduct and withhold a tax equal to 2 per centum of the interest upon such bonds, mortgages, deeds of trust, or other obligations, whether such interest is payable annually or at shorter or longer periods and whether payable to a nonresident alien individual or to an individual citizen or resident of the United States or to a partnership: PROVIDED, That the Commissioner may authorize such tax to be deducted and withheld in the case of interest upon any such bonds, mortgages, deeds of trust, or other obligations, the owners of which are not known to the withholding agent. Such deduction and withholding shall not be required in the case of a citizen or resident entitled to receive such interest, if he files with the withholding agent on or before February 1 a signed notice in writing claiming the benefit of the credits provided in subdivisions (*c*) and (*d*) of section 216; nor in the case of a nonresident alien individual if so provided for in regulations prescribed by the Commissioner under Section 217.

APPENDIX B.

1917 taxes of Fitchburg Railroad Company based on net income of $1,023,701 and assumed invested capital of $2,000,000. all income taxes payable by the lessee.

I. Applying Taxpayer's Theory.

Net income	$1,023,701.00
Invested capital	2,000,000.00
Excess profits credit (8% of invested capital plus $3,000)	163,000.00

Computation of Excess Profits Tax.

% of Invested Capital		Excess Profits Credit		Rate	Tax
0 to 15%	$300,000	—$163,000	—$137,000	20%	$27,400
15% to 20%	100,000			25%	25,000
20% to 25%	100,000			35%	35,000
25% to 33%	160,000			45%	72,000
Over 33%	363,701			60%	218,220.60
	$1,023,701	Excess Profits Tax			$377,620.60

Income Tax.

Net income	$1,023,701.00	
Less excess profits tax	377,620.60	
Taxable at 6%	$646,080.40	$38,764.82
Total tax		$416,385.42

II. Applying Government's Theory.

(a) *Arithmetical computations.*

*Computation Number	Net Income	Tax	Increase In Tax Added to income for next computation
**1.....	$1,023,701.00	$416,385.42	$416,385.42
2.....	1,440,086.42	676,210.02	259,824.60
3.....	1,699,911.02	838,340.47	162,130.45
4.....	1,862,041.47	939,509.88	101,169.41
5.....	1,963,210.88	1,002,639.59	63,129.71
6.....	2,026,340.59	1,042,032.52	39,392.93
7.....	2,065,733.52	1,066,613.71	24,581.29
8.....	2,090,314.71	1,082,892.38	16,278.67
9.....	2,106,593.38	1,092,076.53	9,184.15
10.....	2,115,777.53	1,097,841.18	5,764.65
11.....	2,121,542.18	1,101,438.32	3,597.14
12.....	2,125,139.32	1,103,692.93	2,254.61
13.....	2,127,393.93	1,105,089.81	1,396.88
14.....	2,128,790.81	1,105,970.87	881.06
15.....	2,129,671.87	1,106,511.25	540.38
16.....	2,130,212.25	1,106,848.44	337.19
17.....	2,130,549.44	1,107,058.85	210.41
18.....	2,130,759.85	1,107,190.15	132.30
19.....	2,130,891.15	1,107,272.08	81.93
20.....	2,130,973.08	1,107,323.20	51.12
21.....	2,131,024.20	1,107,355.10	31.90
22.....	2,131,056.10	1,107,375.01	19.91
23.....	2,131,076.01	1,107,387.42	12.41
24.....	2,131,088.42	1,107,395.17	7.75
25.....	2,131,096.17	1,107,400.01	4.84
26.....	2,131,101.01	1,107,403.03	3.02
27.....	2,131,104.03	1,107,404.92	1.89
28.....	2,131,105.92	1,107,406.09	1.07
29.....	2,131,107.09	1,107,406.82	.73
30.....	2,131,107.82	1,107,407.28	.46
31.....	2,131,108.28	1,107,407.57	.29

* Each computation would require separate computations of excess profits tax and income tax as in computation Number 1.

** Computation Number 1 is the same as taxpayers' computation.

*Computation Number	Net Income	Tax	Increase in Tax Added to Income for next computation
32.....	2,131,108.57	1,107,407.75	.18
33.....	2,131,108.75	1,107,407.86	.11
34.....	2,131,108.86	1,107,407.93	.07
35.....	2,131,108.93	1,107,407.97	.04
36.....	2,131,108.97	1,107,408.00	.03
37.....	2,131,109.00	1,107,408.02	.02
38.....	2,131,109.02	1,107,408.03	.01
39.....	2,131,109.03	1,107,408.04	.01

Net taxable income..... $2,131,109.03
Total Tax..... $1,107,408.04

(b) *Using formula.*

Where it was known that all of the additional income resulting from adding the tax to the income would fall in the highest excess profits tax bracket, the following formula could be used:

Let A = Invested Capital ($2,000,000.).
Let B = Excess profits credit ($163,000.).
Let C = Actual income ($1,023,701.).
Let X = Total tax. Then—

$X = [(.15\ A - B)\ .2 + (.05\ A)\ .25 + (.05\ A)\ .35$ plus $(.08\ A)\ .45 + (C + X - .33\ A)\ .6] + \{C + X - [(.15\ A - B)\ .2 + (.05\ A)\ .25 + (.05\ A)\ .35 + (.05\ A)\ .45 + (C + X - .33\ A)\ .6]\}.06.$

Since A, B and C are known quantities resolving this formula shows that

$.376\ X = \$416,385.42$
$X = \$1,107,408.04$, the total tax.
$\$1,023,701 + X = \$2,131,109.03$, the taxable income.

If the excess profits credit exceeded 15% of the invested capital, as was true in some cases, or it was not known in which bracket the additional income would fall, a more involved formula would be necessary, or a series of arithmetical calculations would have to be made.

* Each computation would require separate computations of excess profits tax and income tax as in computation Number 1.

APPENDIX C.

1918 income tax of individual reporting on accrual basis and receiving a salary of $1,000,000 on which employer paid all income taxes.

A. APPLYING TAXPAYER'S THEORY.

		Tax
Net Income	1,000,000	
Less personal exemption	1,000	
	999,000	
Taxable at 6%	4,000	240
Taxable at 12%	995,000	119,400
Normal tax		119,640
Surtax on $1,000,000 at 1918 rates per Treasury Department Tables		583,510
Total Tax		703,150

B. APPLYING GOVERNMENT'S THEORY.

1. *Computation No. 1,*—based on income of $1,000,000, same as taxpayer's computation of tax, showing tax of $703,150.00.

2. *Computation No. 2,*—based on income of $1,703,150. shows tax of $1,244,575.50.

3. *Computation No. 3* would be based on income of $2,244,575.50 and process would be continued until additional tax was less than half a cent.

4. Since in assumed case, all additional income falls in bracket of over $1,000,000 and is subject to single rate of 77% (12% normal tax and 65% surtax), the total tax under government theory can be obtained as follows:

Total tax = $703,150 + 77% of $\frac{100}{77}$ of $703,150.
Total tax = $3,057,173.91.

Proof—Net Income		4,057,173.91
Tax on $1,000,000	$703,150.	
Tax on $3,057,173.91 at 77%.	2,354,023.91	
Total tax		3,057,173.91
Salary after taxes paid		1,000,000.00

If it was not known that the additional income would all fall in the highest surtax bracket the computation would be more complicated.

APPENDIX D.

Computation 1918 income of lessor, assuming invested capital of $2,000,000, rent of $1,000,000 per annum and applying Government's theory but treating income tax of lessor payable by lessee as accrued income of year when payable.

To find income of lessor in 1918 it is necessary to go back to March 1, 1913 when income tax law started.

1913.

Net Income $1,000,000	
Tax on 10 months income at 1% ..... payable June 15, 1914.	$8,333.33

1914.

Rent	1,000,000.00
1913 income tax	8,333.33
Net Income	1,008,333.33
Tax at 1% ..... payable June 15, 1915.	10,083.33

1915.

Rent	1,000,000.00
1914 income tax	10,083.33
Net Income	1,010,083.33
Tax at 1% ..... payable June 15, 1916.	10,100.83

1916.

Rent	1,000,000.00
1915 income tax	10,100.83
Net Income	1,010,100.83
Tax at 2%	20,202.02

payable June 15, 1917.

1917.

Rent	1,000,000.00
1916 income tax	20,202.02
Net Income	1,020,202.02
Invested capital	2,000,000.00

DEDUCTION.

8% of invested capital	160,000.00
Exemption	3,000.00
Excess profits credit	163,000.00

COMPUTATION OF TAX.

0–15%	$300,000.00—163,000=137,000 at 20%	=	27,400.00
15–20%	100,000.00	25%	= 25,000.00
20–25%	100,000.00	35%	= 35,000.00
25–33%	160,000.00	45%	= 72,000.00
33% up	360,202.02	60%	=216,121.21
	1,020,202.02	Excess profits tax	375,521.21
Net Income		1,020,202.02	
Less excess profits tax		375,521.21	
Taxable at 6%		644,680.81	
Income tax			38,680.85
Total tax for 1917			414,202.06

payable June 15, 1918.

1918.

Rent	1,000,000.00
1917 Income and Excess Profits Tax.....	414,202.06
1918 Income	1,414,202.06

To apply the Government's theory of compounding the tax, on this basis of accruals, it is necessary to go back over a series of years. It is not logically permissible to go back only one year, *i. e.*, in the above case to add to 1918 income only the 1917 tax on $1,000,000 although the tax actually to be paid in 1918 would be at least the tax on $1,020,000, the 1917 rent plus the 1916 primary tax payable in 1917.

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Supreme Court of the United States,

OCTOBER TERM, 1928. No. 130.

OLD COLONY TRUST COMPANY, *et al.*,
Executors,
Plaintiff,
AGAINST
COMMISSIONER OF INTERNAL REVENUE,
Defendant.

SUPPLEMENTAL BRIEF ON BEHALF OF OLD COLONY TRUST COMPANY, ET AL., EXECUTORS, SHOWING JURISDICTION OF THE COURT.

Upon the oral argument of this case the Court inquired how it had jurisdiction over a case originating in the Board of Tax Appeals. This brief is filed in accordance with the request of the Court then made. Its purpose is to show that power to review decisions of the Board of Tax Appeals has been properly conferred by Congress on the Circuit Courts of Appeals, and that this case is properly in the Circuit Court of Appeals of the First Circuit and hence, under Section 239 of the Judicial Code, the certified question is properly before this Court.

There is no question but that the statutes provide that on petition, as in the case at bar, the Circuit Courts of Appeal may review decisions of the Board of Tax Appeals. The sole question at issue is whether, in so providing, Congress exceeded its constitutional power.

Statement of Case.

As appearing in the record in the Court below, this case, involving the Federal income taxes of William M. Wood, deceased, for the years 1919 and 1920, originated by the filing of a petition with the Board of Tax Appeals on August 22, 1925, appealing from a decision of the Commissioner of Internal Revenue of which the taxpayer was notified on June 27, 1925. Such appeal was taken pursuant to Sections 274(a) and 280 of the Revenue Act of 1924. The Board of Tax Appeals had jurisdiction under Section 283(b) of the Revenue Act of 1926.

The case was heard by the Board of Tax Appeals on April 11, 1927, its opinion was promulgated on July 13, 1927, and its order of redetermination fixing the amount of the deficiencies was entered on the same date, and amended on November 12, 1927.

As shown by the certificate, the taxpayer, pursuant to Sections 1001 and 1003 of the Revenue Act of 1926, and Rule 38 of the Circuit Court of Appeals for the First Circuit, filed a petition for review of the Board's decision by the Circuit Court of Appeals for the First Circuit. (Certificate, p. 2.) The Board thereupon sent the record to the Circuit Court of Appeals for the First Circuit which certified a question of law to this Court on May 2, 1928, pursuant to Section 239 of the Judicial Code, as amended. (Certificate, p. 3.)

Constitution and Statutes.

In Appendix A of this brief we have set forth the provisions of the Revenue Act of 1926 with respect to the Board of Tax Appeals (Section 1000), and the court review of its decisions (Sections 1001 to 1004), the provisions conferring jurisdiction on the Board of Tax Appeals (Sections 274, 283), provisions of the Revenue Acts of 1924 and 1928 with respect to the Board of Tax Appeals, and other relevant provisions of the statutes, and also the relevant provisions of the Constitution of the United States.

Summary of Argument.

Sections 1001 and 1003 of the Revenue Act of 1926, provide for review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals and the sole issue before the Court is the constitutionality of these sections. Such statutes are not unconstitutional unless they impose on the courts the exercise of non-judicial powers.

If the Board of Tax Appeals itself is vested with judicial power, it was within the power of Congress to provide for review of its decisions by the courts. Such Board is not a constitutional court, but is a legislative tribunal properly constituted in aid of the taxing power and properly vested with judicial power to determine tax controversies between the Government and taxpayers.

Even if the Board of Tax Appeals is regarded as an administrative tribunal, not exercising judicial power, Congress could give the courts the power to review its decisions on questions of law, in substantially the same manner as the courts review cease and desist orders of the Federal Trade Commission, without investing the courts with non-judicial power.

Even in those cases where the petition to the Board of Tax Appeals was filed prior to the enactment of the Revenue Act of 1926 and the taxpayer is not denied the right to file a claim for refund, review of decisions of the board does not involve the exercise of non-judicial powers. The statute makes the decisions of the Circuit Court of Appeals final in all cases and conclusive on the parties as to all issues decided. Even were this not the case review of the decisions of the Board of Tax Appeals as provided in the statute is a judicial function.

The practical consequences of holding unconstitutional the provisions for court review, would be serious. Such a holding would deprive of their authority many decisions already rendered by the courts, and would raise grave doubt as to the validity of all of the provisions establishing the Board of Tax Appeals.

Preliminary Statement.

The Revenue Act of 1926, enacted February 26, 1926, continued the existence of the Board of Tax Appeals, first established by Section 900 of the Revenue Act of 1924, enacted June 2, 1924. The Board of Tax Appeals was created for the purpose of providing taxpayers an opportunity to secure an independent judicial review of the Commisisoner's determination of additional income and estate taxes in advance of the actual payment. Prior to the enactment of the Revenue Act of 1924 taxpayers were compelled to pay the amount of tax finally determined by the Commissioner and their only remedy was a court proceeding to recover the amount paid. The functions and status of the Board were substantially modified by the Revenue Act of 1926, as is shown below.

(1) *The present provisions as to the Board of Tax Appeals.*

The present provisions as to the establishment of the Board of Tax Appeals are contained in Sections 900 to 911 of the Revenue Act of 1924, as amended and added by Section 1000 of the Revenue Act of 1926. (Appendix A, pp. 35 to 43.) These statutes have been amended by Sections 601 to 603 of the Revenue Act of 1928, but such amendments do not make any fundamental change in the character of the Board.

The 1926 Act provides substantially as follows:

The Board of Tax Appeals is "an independent agency in the executive branch of the Government". (Section 900.) It is charged with the function of reviewing, on application of the taxpayers, determinations of the Commissioner of Internal Revenue as to the amount of additional income or estate taxes due the Government from taxpayers. (Sections 274, 308.)

The sixteen members of the Board are appointed for definite terms by the President, by and with the advice and consent of the Senate, and are removable by the President for specified causes. (Section 901.)

The Board designates its own chairman, and has a seal, which shall be judicially noticed. (Section 903.) The Board has such jurisdiction as is conferred on it by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. (Section 904.)

Notice and opportunity to be heard are to be given to the Commissioner and the taxpayer in every case, and the Commissioner is represented by counsel. Hearings before the Board and its divisions are public, and are stenographically reported. Proceedings of the Board are conducted under such rules of practice and procedure as the Board prescribes and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. Pleadings, notices, etc., are served by registered mail. The Board makes written findings of fact and decisions, except where the case is dismissed on motion, and may also write an opinion. All reports of the Board and all transcripts of evidence are public records, and opinions of the Board are published at Government expense. (Section 907.)

Board members may administer oaths, examine witnesses, and issue subpœnas. (Section 908.) Witnesses receive the same fees and mileage as witnesses in the Federal courts. (Section 909.)

The 1926 statute provides for a notice by the Commissioner of Internal Revenue to the taxpayer by registered mail of the determination of a deficiency in income tax, *i. e.*, an amount of income tax in excess of that reported, or previously assessed or paid, and within sixty days thereafter taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. (Section 274(a).) After the sending of such a notice, the Commissioner, except in certain special cases, such as bankruptcy, cannot assess the deficiency during the sixty day appeal period, nor, if a petition is filed with the Board, until the decision of the Board has become final, and the taxpayer is given the right to enjoin the making of any such assessment. (Section 274(a).)

If the taxpayer files a petition with the Board the deficiency as redetermined by the Board is to be assessed and paid. No part of the deficiency disallowed by the Board can be assessed or collected by the Commissioner. (Section 274(b).)

The Board is given jurisdiction to increase the deficiency over that shown in the Commissioner's notice if the Commissioner makes such a claim at or before the hearing (Section 274(e)), and to determine that the taxpayer not only owes no tax, but has overpaid. (Section 284(e).) The Board is given jurisdiction with respect to determination of taxes for years prior to 1926, and also of all appeals pending at the enactment of the Revenue Act of 1926. (Section 283.)

The statute provides for judicial review of the Board's decisions by filing by the Commissioner or the taxpayer of a petition for review by a Circuit Court of Appeals under rules to be adopted by such courts, or if no rules are adopted, in accordance with the practice as to a writ of error. (Section 1001(a) (b).) On September 17, 1926, a conference of the senior judges, presided over by the Chief Justice of the Supreme Court, recommended rules, which have now been adopted in substance by all of the Circuit Courts of Appeals and by the Court of Appeals of the District of Columbia. The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia are given exclusive jurisdiction to review the decisions of the Board "(except as provided in Section 239 of the Judicial Code as amended)", and the judgments of such courts are made final, except for review by this Court on certiorari. (Section 1003(a).)

Upon such review the courts are given power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for rehearing. (Section 1003(b).)

Detailed provisions as to when the decision of the Board becomes final are contained in Section 1005.

Similar procedure for the determination and review of deficiencies in estate taxes is prescribed in Sections 308, 312, 318 and 319 of the Revenue Act of 1926.

A taxpayer is not required to appeal to the Board of Tax Appeals if he desires to contest the Commissioner's determination but may waive such appeal, pay the tax, file a claim for refund, and sue for recovery of the tax, if he so desires.

The Board makes no independent investigations, and its function is to review determinations of the Commissioner of Internal Revenue as to the amount of additional income and estate taxes, on the basis of the evidence presented to the Board at the hearing and in accordance with the laws applicable.

(2) *The constitution and status of the Board of Tax Appeals under the Revenue Act of 1924.*

Although the Revenue Act of 1926 continued the Board of Tax Appeals created by the Revenue Act of 1924, it made substantial changes in the Board as it existed under the earlier act which was before the Court in *Blair* v. *Oesterlein Machine Co.*, (1927) 275 U. S. 220, and *Williamsport Wire Rope Co.* v. *United States*, (1928) 277 U. S. 551. Under the 1924 Act the deficiency determined by the Board was assessed and collected (Section 274(b)), but the taxpayer could file a claim for refund, and if such claim was denied, sue for recovery of the tax. (Section 281, Section 3226 R. S.) If the Board disallowed the deficiency claimed by the Commissioner the Commissioner could not assess or distrain, but could sue for such deficiency without assessment. (Section 274(b).) In such court proceedings the case was tried *de novo*, but the Board's findings of fact were *prima facie* evidence of the facts. (Section 900(g).)

Under the Revenue Act of 1926, however, the decision of the Board, unless reversed or reviewed by the courts, is final and conclusive on the parties. The Commissioner cannot assess, collect, or sue for a deficiency disallowed by the Board, and the taxpayer, where he filed his petition after the enact-

ment of the Revenue Act of 1926, cannot claim a refund of any amount paid pursuant to the Board's decision. (Section 284(d); Section 3226 R. S.)

Other important differences between the two statutes are that under the 1924 Act the Board prescribed its own rules of evidence. (Section 900(h).) Under the 1926 Act the Board is required to follow the rules of evidence applicable in courts of equity in the District of Columbia (Section 907). Under the 1924 Act the Board had no power to order refunds; under the 1926 Act such power is specifically given. (Section 284(e).) Under the 1924 Act the taxpayer had no power to enjoin assessments or distraints during the pendency of the Board proceedings. Under the 1926 Act the right of injunction is given. (Section 274(a).)

(3) *Cases pending when the 1926 Act was adopted.*

Many cases were pending before the Board of Tax Appeals on February 26, 1926, when the 1926 Act was enacted. These appeals had been filed under the 1924 Act, when the Board's decision did not finally determine the rights of either party. The Board was given jurisdiction of such appeals (Section 283) and the new provisions for court review applied to all decisions in such cases, except where the hearing had been held prior to the passage of the Revenue Act of 1926. (Section 283(j).) In such cases the finding of the Board is conclusive on the Commissioner, just as in other cases. As to taxpayers, however, under the law in force when they elected to appeal to the Board and framed their pleadings no such consequence was attached to such appeal, and Congress did not cut off their right to file a claim for refund, and Section 284(d) of the Revenue Act of 1926 does not, therefore, specifically deny the right to file a claim for refund.

Petitions for review of decisions of the Board of Tax Appeals have been filed in many cases both by the taxpayers and by the Government. Eight of the nine Circuit Courts of Appeals and the Court of Appeals of the District of Columbia have rendered decisions on such cases without doubting their

jurisdiction. A list of these cases is given in Appendix B hereof. Most of these cases were cases where the petition to the Board of Tax Appeals was filed prior to the enactment of the Revenue Act of 1926. In addition to the sixty-six cases listed in Appendix B, which have already been decided, we are advised that there are approximately 320 review cases now pending in the Circuit Courts of Appeals throughout the country.

ARGUMENT.

Congress had power under the Constitution to provide for review of decisions of the Board of Tax Appeals by the Circuit Courts of Appeals.

The only question is whether non-judicial power is conferred on the Circuit Courts of Appeals by Sections 1001 to 1003 of the Revenue Act of 1926, which provide for court review of decisions of the Board of Tax Appeals by the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia, subject to certification to this court of questions of law under Section 239 of the Judicial Code as amended and to certiorari by this court under Section 240 of the Judicial Code as amended. The intent of Congress to vest such jurisdiction in the Circuit Courts of Appeals is clear and such courts are authorized by Section 239 of the Judicial Code as amended to certify questions or propositions of law to this court "in any case, civil or criminal, in the Circuit Court of Appeals."

I. If the Board of Tax Appeals is vested with judicial power, Congress had power to provide for review of its decisions by the courts.

(a) *The Board of Tax Appeals is a "legislative tribunal" exercising judicial and not administrative power, except in special assessment cases, although such power is not derived from Article III.*

The Board of Tax Appeals is of course not a court within the meaning of Article III of the Constitution and does not derive judicial power from that section. The functions of the Board and the nature of the proceedings before it show clearly, however, that at least in ordinary cases the Board exercises judicial powers. This was the intention of Congress as shown by the reports of the House Ways and Means Committee and the Senate Finance Committee, reprinted as Appendix D. It was within the power of Congress to establish the Board as a legislative tribunal exercising judicial power, although authority to confer such power was not derived from Article III.

Congress exercises the function of creating courts or tribunals under several different grants of power. It creates courts inferior to the Supreme Court under Article III of the Constitution. These courts, generally referred to as "constitutional courts", exercise only the judicial power referred to in Article III and may be vested with no other judicial power.

Interstate Commerce Commission v. *Brimson* (1894), 154 U. S. 447, 485;

Keller v. *Potomac Electric Company* (1923), 261 U. S. 428;

Postum Cereal Company v. *California Fig Nut Company* (1926), 272 U. S. 693;

Liberty Warehouse Company v. *Grannis* (1927), 273 U. S. 70.

Congress may exercise, however, and has exercised, its powers to create courts or judicial tribunals under other grants of power than that contained in Article III of the Constitution. It has created courts to exercise complete jurisdiction over the District of Columbia by reason of the exclusive jurisdiction that Congress has over the District. It has created courts known as "territorial courts" by reason of the power of the United States to govern the territory which it owns. *The City of Panama* (1879), 101 U. S. 453, 460; *Reynolds* v. *United States* (1878), 98 U. S. 145, 154, *McAlister* v. *United States* (1891), 141 U. S. 174, 184. In regard to courts created by Congress under its power to make rules and regulations respecting territory belonging to the United States, Chief Justice Marshall in the case of *American Insurance Company* v. *Cantor* (1828), 1 Pet. 511, 546, said:

> "They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d Article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them Congress exercises the combined powers of the general and of a state government."

In addition to legislative tribunals created under the power to govern territories, Congress may also create tribunals to determine questions arising between the United States and private individuals in regard to the collection of revenue, the granting of public lands, the collection of debts, the government of Indian tribes, and the like.

United States v. *Ferreira* (1851), 13 How. 40; (*Gordon* v. *United States* (1864), 117 U. S. 697, 699); the granting of public lands (*United States* v. *Coe* (1894), 155 U. S. 76, 86); the maintenance of military and naval forces (*Winthrop, Military Laws* and *Precedents* (2d ed., reprint 1920), p. 48; *Carter* v. *Roberts* (1900), 177 U. S. 496; *Ex parte Dickey* (D. C. Me., 1913), 204 Fed. 322; *Ex parte Foley* (D. C. Ky., 1917), 243 Fed. 470; *United States* v. *Sugar* (D. C. Mich., 1917), 243 Fed. 423; *United States* v. *Stephens* (D. C. Del., 1917), 245 Fed. 956, affirmed 247 U. S. 504; *United States* v. *McDonald* (1920), 265 Fed. 754, 759, 760); the occupation by military forces of territory as a conquest (*Santiago* v. *Nogueras* (1909), 214 U. S. 260); the government of Indian tribes (*Stephens* v. *Cherokee Nation* (1899), 174 U. S. 445, 477-8; *Wallace* v. *Adams* (1907), 204 U. S. 415; *Ross* v. *Stewart* (1913), 227 U. S. 530; *In re Jessie's Heirs* (D. C. Okla., 1919), 259 Fed. 694).

The power of Congress to levy and collect taxes carries with it the power to provide all the necessary means for such levying and collection. *United States* v. *288 packages of Merry World Tobacco* (1900), 103 Fed. 453, 455.

See Opinion as to the powers of Congress to create tribunals appearing in 68 Cong. Rec., pp. 3181-3182, reprinted as Appendix C of this brief.

Under that power Congress created the Board of Tax Appeals and vested it with judicial power.

The Committee on Ways and Means of the House of Representatives and the Senate Finance Committee, in their reports dealing with the establishment of the Board of Tax Appeals under the Revenue Act of 1926, said:

> "In the view of the Committee the decisions of the Board are judicial and not legislative or administrative determinations." (Appendix D, pp. 66 and 67.)

As stated by this Court in the case of *Blair* v. *Oesterlein Machine Company* (1927), 275 U. S. 220, 226:

> "An examination of the sections creating the Board and investing it with power, can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character."

The decision of the Board in ordinary cases is not of an administrative or advisory nature such as was considered in *Keller* v. *Potomac Electric Company* (1923), 261 U. S. 428 at 444, and *Postum Cereal Company* v. *California Fig Nut Company* (1927), 272 U. S. 693,—its decision results in a determination which ends the litigation between adverse parties subject to court review as to questions of law. The decision of the Board is not subject to review by any executive officer as was true of the determinations considered in the cases of *United States* v. *Ferreira* (1851), 13 How. 40; *Gordon* v. *United States* (1864), 117 U. S. 697, and *In Re Sanborn* (1893), 148 U. S. 222.

It is true that the Board of Tax Appeals does not issue execution to carry its judgment into effect, but the issuance of an execution is not an essential characteristic of the exercise of the judicial power. *Fidelity National Bank* v. *Swope* (1927), 274 U. S. 123, 132; *Tutun* v. *United States* (1926), 270 U. S. 568, 576-577. The United States Court of Claims which is a tribunal clearly exercising judicial power, does not issue execution. *La Albra Silver Mining Company* v. *U. S.* (1899), 175 U. S. 423, 461.

All of the attributes of a judicial determination are present in a decision of the Board. The parties are adverse in interest, so that the case of *South Spring Mining Company* v. *Amador Medean Gold Mining Company* (1892), 145 U. S. 300, does not apply. The controversies are actual controversies and not attempts to secure an abstract determination such as were considered in *Muskrat* v. *United States* (1911), 219 U. S. 346-361, and *Texas* v. *Interstate Commerce Commission* (1922), 258 U. S. 158, 162. Except in special assessment cases (See *Williamsport Wire Rope Co* v. *United States*

(1928), 277 U. S. 551) the controversies decided by the Board are of the same nature and are decided on the same basis as controversies over the revenue arising in the District Courts, or the U. S. Court of Claims.

Congress, therefore, clearly had the power to create a legislative tribunal under its power to levy and collect taxes and to vest such a tribunal with judicial powers. The Board of Tax Appeals is such a tribunal vested with judicial power.

(b) *Congress had authority to provide for review by the Circuit Courts of Appeals of decisions of the Board in the exercise of such judicial power.*

If the decisions of the Board of Tax Appeals are in the exercise of judicial power, although not conferred under Article III, the review of decisions in the exercise of such power is a strictly judicial function.

If the action of the Circuit Courts of Appeals be considered appellate and revisory, there is no constitutional objection to providing for the review of the judicial determination of the Board of Tax Appeals by those courts. The fact that a legislative tribunal is vested with judicial power not derived from Article III does not make it improper to provide for judicial review of such decisions by courts deriving their authority from Article III.

The judicial power vested in the territorial courts and the courts of the District of Columbia is not judicial power derived from Article III, yet review of the decisions of such tribunals by the constitutional courts is proper in cases where such tribunals in fact exercise judicial power.

Reynolds v. *United States* (1878), 98 U. S. 145;
The City of Panama (1879), 101 U. S. 453.

The judicial power exercised by the Board of General Appraisers was not derived from Article III of the Constitution, but judicial review of their decisions was deemed proper.

Marshall Field v. *Clark* (1892), 143 U. S. 649;

United States v. *Lies* (1898), 170 U. S. 628;
United States v. *Stone & Downer Co.* (1927), 274 U. S. 225.

It may be that when the Board exercises functions other than judicial functions, such as the review of the Commissioner's action in special assessment cases, such action cannot be reviewed by the courts, although even in such cases review on questions of law may be proper. However, where a tribunal exercises both judicial and non-judicial functions its judicial determinations may be reviewed by the courts, although no review may be had of the non-judicial functions. It is well settled that the Supreme Court can review the action of the Court of Claims in cases where that court exercises judicial powers.

DeGroot v. *United States* (1866), 5 Wall. 419, 427;
United States v. *Alire* (1867), 6 Wall. 573, 576;
United States v. *Klein* (1871), 13 Wall. 128, 144;
United States v. *O'Grady* (1874), 22 Wall. 641;
United States v. *Jones* (1886), 119 U. S. 477.

When the Court of Claims or other legislative tribunal exercises powers which are not judicial in nature, this Court has held that it cannot review such action.

Gordon v. *United States* (1864), 117 U. S. 697;
In re Sanborn (1893), 148 U. S. 222;
Keller v. *Potomac Electric Company* (1923), 261 U. S. 428;
Postum Cereal Company v. *California Fig Nut Company* (1927), 272 U. S. 675.

If the action of the Circuit Courts of Appeals be considered original and *de novo,* there is no question as to the validity of the provisions for court review. As stated by the court in *Stephens* v. *Cherokee Nation* (1879), 174 U. S. 445, 447:

"As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend

> no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it, exercising only *quasi* judicial powers, by the transfer of their proceedings and decisions, denominated appeals for want of a better term, to judicial tribunals for examination and determination *de novo;* and, as will be presently seen, could certainly do so in respect of the action of tribal authorities."

In the case of *Ruth Iron Company* v. *Commissioner* (1928), 26 F. (2d) 30, the Circuit Court of Appeals for the Eighth Circuit refers to a proceeding before it on petition for review from the Board of Tax Appeals as an original action. Congress could validly provide for an original proceeding in a Circuit Court of Appeals, rather than in a District Court. The power of Congress to establish inferior courts is not limited. It can establish such courts as it sees fit and vest them with original or appellate jurisdiction. *Martin* v. *Hunter* (1816), 1 Wheat. 304, 337; *Insurance Company* v. *Dunn* (1873), 19 Wall, 214, 226. In the latter case, the court said:

> "As regards the inferior courts authorized to be established, Congress may give them such jurisdiction, both original and appellate, within the limits of the Constitution, as it may see fit to confer. How their appellate jurisdiction shall be exercised, is not declared. The whole subject is remitted to the unfettered discretion of Congress."

It is submitted that when the Board of Tax Appeals exercises judicial power, as it did in this case, review of its decision as to questions of law is a judicial function which may properly be vested in the Circuit Courts of Appeals through an original proceeding or an appellate proceeding.

II. Even if the Board of Tax Appeal be regarded as an administrative tribunal, Congress could give the courts power to review its decisions on questions of law.

Even if the Board be considered only an administrative tribunal, the judicial review of its decisions as to questions of law by the Circuit Court of Appeals does not impose on that court the exercise of non-judicial functions. Whether the proceeding in the Circuit Court of Appeals is strictly an original proceeding or not, such review has been sanctioned by this Court in the review of cease and desist orders of the Federal Trade Commission.

The Act with respect to the Federal Trade Commission in Section 45, Title 15, U. S. C. (Act of September 26, 1914, Chapter 311, Section 5, 38 Stat. 719; Act of February 13, 1925, Chapter 229, Section 2, 43 Stat. 939) provides that if any person, partnership or corporation fails to obey an order of the Federal Trade Commission to cease and desist, the Commission may apply to a Circuit Court of Appeals for the enforcement of its order, certifying and filing with its application a transcript of the entire record in the proceeding including all the testimony taken. The court, upon notifying the adverse party, has jurisdiction and has power to make a decree affirming, modifying or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by testimony, are conclusive. If either party shows ground for taking additional testimony the court may refer the matter to the Commission for the taking of such additional testimony and the Commission may then, if it chooses, amend its findings and recommend the modification of its order. The party required by the order to cease and desist may obtain a review of the order in a Circuit Court of Appeals by filing in the court a written petition, in which case the procedure is substantially the same.

In all essential respects, the procedure for review of the orders of the Trade Commission is the same as the procedure for review of the decisions of the Board of Tax Appeals. The decisions of the Federal Trade Commission, like those of the Board of Tax Appeals, are conclusive as to the facts if supported by evidence. The Circuit Court of Appeals in both cases has power to affirm, modify or reverse the decision under review. In both cases the Circuit Court of Appeals has exclusive jurisdiction to review and its decision is final except for review by the Supreme Court.

It is well settled that the Circuit Courts of Appeals are properly invested with jurisdiction of the proceedings for enforcing or reviewing the orders of the Federal Trade Commission and that their decisions may be reviewed by the United States Supreme Court.

Federal Trade Commission v. *Gratz* (1920), 253 U. S. 421;

Federal Trade Commission v. *Beech-nut Packing Company* (1922), 257 U. S. 441;

Federal Trade Commission v. *Curtis Publishing Company* (1923), 260 U. S. 568;

Federal Trade Commission v. *Sinclair Refining Company* (1923), 261 U. S. 463;

Federal Trade Commission v. *Western Meat Company* (1926), 272 U. S. 554;

Federal Trade Commission v. *Eastman Kodak Company* (1927), 274 U. S. 619;

Chamber of Commerce of Minneapolis v. *Federal Trade Commission* (1923), 280 Fed. 45 (8th C. C. A.);

L. B. Silver v. *Federal Trade Commission* (1923), 292 Fed. 752 (6th C. C. A.);

Butterick Publishing Company v. *Federal Trade Commission* (1925), 4 F. (2d) 910 (2nd C. C. A.);

Moir v. *Federal Trade Commission* (1926), 12 F. (2d) 22 (1st C. C. A.);

Federal Trade Commission v. *Balme* (1928), 23 F. (2d) 615.

Congress in providing for review of the Board of Tax Appeals' decisions by the Circuit Courts of Appeals relied upon the judicial approval of the similar provisions for review of the action of the Federal Trade Commission.

The House Ways and Means Committee (House Report No. 1, 69th Congress) in its report on the Revenue Act of 1926 said:

> "Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the packers and stockyards act."

See Appendix D, p. 66.

These provisions for review are within the trend of recent legislation with respect to fact finding tribunals with special judicial powers. See The Grain Futures Act (September 21, 1922, Chapter 369, 42 Stat. 98; U. S. C. Title 7, Chapter 1, Sections 8 and 9, and The Packers and Stockyards Act August 15, 1921, Chapter 64, 42 Stat. 159, U. S. C. Title 7, Chapter 9). *F. G. Bishoff* v. *Commissioner of Internal Revenue* (1928), 27 Fed. (2d) 91.

III. Even in those cases where the petition to the Board of Tax Appeals was filed prior to the enactment of the Revenue Act of 1926 and the taxpayer is not denied the right to file a claim for refund, review of decisions of the Board does not involve the exercise of non-judicial powers.

The general plan of procedure under the Revenue Act of 1926 is that if a taxpayer elects to appeal to the Board of Tax Appeals from the Commissioner's decision, the decision of the Board, subject to review by the courts, is final and conclusive on both parties. (Section 274(b), Section 284(d)(e).)

However, Congress did not specifically deny the right to file a claim for refund, after the Tax Board proceeding, to taxpayers who had filed petitions with the Board prior to the enactment of the Revenue Act of 1926. (Section 284(d).) This was a just and equitable provision since when such petitions were filed the Tax Board proceeding was merely a preliminary inconclusive proceeding and the Board had no power to order a refund. The record in the court below shows that the petition in this case was filed with the Board prior to the enactment of the Revenue Act of 1926, and that the hearing was held subsequent thereto.

The fact that in this particular class of cases Congress did not specifically deny the right to file a claim for refund does not prevent the decision of a Circuit Court of Appeals from being a binding and conclusive decision finally settling all issues presented to and passed upon by it.

The statute specifically provides that decisions of the Circuit Court of Appeals shall be final and conclusive on the parties. Section 1003(a) of the Revenue Act of 1926 provides:

> "The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in Section 239 of the Judicial Code as amended); *and the judgment of any such court shall be final,* except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 240 of the Judicial Code as amended". (Italics supplied.)

We find nothing in the statutes which would permit any taxpayer to secure a refund or to bring a suit based on grounds with respect to which a final decision of the Circuit Court of Appeals had been rendered adverse to the taxpayer's claim.

The right to sue in any case for the recovery of an internal revenue tax illegally collected is based upon the jurisdiction given to the Federal District Courts and the Court of Claims over such litigation. Section 24, sub-

division 5 and 20, Judicial Code; *United States* v. *Emery, Bird, Thayer Realty Company* (1915), 237 U. S. 28. The right to file a claim for refund rests upon the fact that this is a necessary prerequisite of a suit. (Section 3226 R. S.; *The Rock Island, etc. Railroad Company* v. *United States* (1920), 254 U. S. 141), and that the Commissioner can make a refund or credit after a certain length of time only if such a claim is filed (Section 284 Revenue Act of 1926). There is nothing in the law which would permit a taxpayer successfully to sue for a refund, free from the plea of *res adjudicata,* when such suit was based on grounds as to which a final decision of a Circuit Court of Appeals adverse to the taxpayer had been rendered.

We therefore maintain that a decision by the Circuit Court of Appeals on a petition for review is a proper exercise of judicial power and that such decision is a final decision and *res adjudicata* as to the issues decided by such Court on the merits. In any such case in which a decision has been rendered by the Circuit Court of Appeals the claim for refund would necessarily be limited to issues not passed upon by the Circuit Court of Appeals. This is the view of the law taken in the only two cases discussing the question.

Emery, Executor v. *United States* (1928), 27 F. (2d), 992 (D. C. Pa.);

Old Colony Railroad Co. v. *United States* (1928), 27 F. (2d), 994 (D. C. Mass.).

If the view should be taken that on a suit on a rejected claim for refund the taxpayer could bring the entire controversy into court again (a view which we believe to be incorrect) the Court would nevertheless have jurisdiction where such jurisdiction is expressly conferred and a case or controversy is before it. Thus in the matter of applications for certificates of naturalization it has been held that each application is a case or controversy, the decision in which may be reviewed by the courts, but that nevertheless the Government has the right to bring a new proceeding to cancel the

application granted, and that the prior decision is not *res judicata.*

United States v. *Ness,* 245 U. S. 319;
Tutun v. *United States,* 270 U. S. 568;
Maney v. *United States* (October 22, 1928), 73 L. Ed. 13.

Even if this should be considered as permitting a splitting up of a single controversy or cause of action, there is no reason why Congress could not consent to a suit or proceeding against the United States, although a separate suit or proceeding had been brought in connection with a different question or questions arising in the same controversy. There are other instances where two suits may be brought for the same tax liability for the same period.

Sage v. *United States* (1919), 250 U. S. 33;
Coffey v. *Exchange Bank* (1924), 296 Fed. 807.

It is not essential to determine in this case whether a decision of the Board of Tax Appeals, not reviewed by a Circuit Court of Appeals, is such an exercise of judicial power as to foreclose the taxpayer from filing a claim for refund and bringing suit based on grounds which have been passed upon by the Board of Tax Appeals on the merits. Whatever may be the effect of the Board's decision, it is clear that Congress provided that the decision of the Circuit Court of Appeals should be final and conclusive on the parties as to any matters therein decided.

It should be noted that the Board of Tax Appeals in its proceedings makes no distinction whatsoever between those cases in which the petition was filed before, and those cases in which the petition was filed after, the enactment of the Revenue Act of 1926. All cases heard and decided after the enactment of the Revenue Act of 1926 are heard and decided under exactly the same procedure and on exactly the same basis. Furthermore, in many instances the Board has consolidated for hearing and decision cases in which petitions

were filed before and cases in which petitions were filed after the enactment of the Revenue Act of 1926. The Circuit Courts of Appeals have made no distinction between the two classes of cases. All but four of the cases listed in Appendix B were cases in which the petition was filed prior to the enactment of the Revenue Act of 1926 or in which both classes of cases were joined in one proceeding.

Inspection of the various provisions of the Revenue Act of 1926 dealing with the Board of Tax Appeals (Sections 274, 277, 279, 280, 283, 284, 308, 310, 312, 316, 318, 319 and 1000 to 1005), will show that it would be necessary for the Court substantially to re-write the statute in order to hold invalid the provisions with respect to judicial review of cases where the petition was filed prior to the enactment of the Revenue Act of 1926 and to hold such provisions for judicial review valid in other cases. For example, the Court would have to introduce an exception not made by Congress into the provisions of Section 1000(a) providing for judicial review of all Board decisions rendered after the enactment of the Revenue Act of 1926, except where the hearing had been held prior to the enactment of the Revenue Act of 1926. The Court would have to expand the provisions of Section 283(j) to include all cases where the petition was filed prior to the enactment of the Revenue Act of 1926.

The Court would also have to supply some provision to determine when a decision of the Board of Tax Appeals becomes final in such a case so that the Commissioner may be permitted to assess and collect the tax (see Section 274). The provisions of Section 1005 as to the date on which the Board's decision becomes final do not seem to cover a case where there is no judicial review of the Board's decision. The question would arise as to the period during which the Commissioner was prohibited from assessing under Section 274(a) and this in turn would raise a question as to the period for which the statute of limitations was suspended under Section 277(b). In fact the provisions with respect to the Board of Tax Appeals and with respect to

judicial review of all decisions made after the enactment and the Revenue Act of 1926 are such an integral part of the Revenue Act as to make it extremely difficult to administer or interpret, if such provisions are held invalid in whole or in part, without substantially re-writing the statute.

It is therefore submitted that the fact that the petition in this case was filed prior to the enactment of the Revenue Act of 1926 furnishes no basis for doubting the validity of the provisions of the statute for judicial review of such decisions.

IV. The practical consequences of denying the jurisdiction of the courts in these cases would be extremely serious.

Some 320 review cases are pending in the Circuit Courts of Appeals. These courts have heretofore decided at least 66 cases on petitions for review of decisions of the Board of Tax Appeals and most of such cases originated on petitions filed with the Board prior to the enactment of the Revenue Act of 1926.

A decision that the Circuit Courts of Appeals have no jurisdiction of these cases, or of a large majority of these cases, would cause great confusion. Taxes have been collected, refunds have been made and collection of deficiencies withheld on the basis of the decisions rendered. If these courts had no jurisdiction their judgments are a nullity and are subject to collateral attack. The unsettling of these decisions would cause great confusion and lead to much litigation.

The Board of Tax Appeals is an important tribunal and an integral part of the machinery provided by Congress for the determination and assessment of income and estate taxes. It has decided many cases and many cases are pending before it involving a large amount of revenue. A decision that the provisions for judicial review of the Board's decisions were invalid would raise grave doubt as to the validity of the pro-

visions establishing the Board and as to the binding effect of its decisions. (*Muskrat* v. *United States* (1911), 219 U. S. 346.) It is unlikely that Congress would have invested the Board with the powers conferred by the Revenue Act of 1926 to make a binding decision as to the Government and the taxpayers without the provision for judicial review. If the provisions establishing the Board are invalid the result undoubtedly would be to burden the District Courts and the Court of Claims with a great mass of litigation which can be much more efficiently handled by the Board of Tax Appeals.

The Government has withheld collection of a large amount of revenue pending the determination of proceedings before the Board of Tax Appeals. The statute of limitations is suspended while such proceedings are pending (Section 274(a), Section 277(b), Revenue Act of 1926). If the provisions for the establishment of the Board of Tax Appeals are unconstitutional, there was no period during which the Commissioner was prohibited from assessing and collecting the taxes, the statute of limitations was not suspended by the pendency of the Board's proceedings and the Government may be barred from collecting hundreds of millions of revenue and may have to refund a large amount of revenue already collected (Section 607, Revenue Act of 1928).

V. The presumption is in favor of the validity of the statute. The statute should be so construed as to avoid grave constitutional doubts.

It is, of course, well settled that the presumption is that acts of Congress are constitutional. *Nicol* v. *Ames* (1899) 173 U. S. 509, 515. *Buttfield* v. *Stranahan* (1904), 192 U. S. 470, 492. *Binns* v. *U. S.* (1904), 194 U. S. 486, 494.

As stated in *Nicol* v. *Ames, supra:*

> "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Con-

gress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive."

Conclusion.

Congress had power under the Constitution to provide for review of decisions of the Board of Tax Appeals by the Circuit Courts of Appeals: this case is properly in the Circuit Court of Appeals of the First Circuit and under Section 239 of the Judicial Code the question certified in this case is properly before the Court.

Respectfully submitted,

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APPENDIX A.

Constitution and Statutes.

1. *Provisions of Constitution of the United States.*

Article III, Section 1:

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Article III, Section 2:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to controversies to which the United States shall be a party * * *."

Article I, Section 8:

The Congress shall have power to levy and collect taxes, duties, imposts and excises, and to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States * * * to constitute tribunals inferior to the Supreme Court * * * to make all laws which shall be necessary or proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States or in any department or officer thereof.

2. *Provisions of Judicial Code.*

Section 239 as amended. (U. S. C., Title 28, § 346.)

"Certificates of questions by Circuit Courts of Appeals and Court of Appeals of District or Columbia. In any case, civil or criminal, in a Circuit Court of Appeals,

or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions or propositions certified, or may require that the entire record in the case be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

3. *Provisions of the Revenue Act of 1926.* (Feb. 26, 1926, c. 27, 44 Stat. 10, U. S. C., Title 26, § 19.)

"Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has been made final. Notwithstanding the provision of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from

the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

* * * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered, for the purposes of this subdivision or of subdivision (a) of this section, or of subdivision (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such

notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

* * * * * *

(h) For the purposes of this title the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1005."

Sec. 277 * * * (b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

Sec. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purpose of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

(b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

(c) If before the enactment of this Act the Commissioner has mailed to any person a notice under subdivision (a) of section 274 of the Revenue Act of 1924 (whether in respect of a tax imposed by Title II of such Act or in respect of so much of an income, war-profits or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and if the 60-day period referred to in such subdivision has not expired before the enactment of this Act and no appeal has been filed before the enactment of this Act, such person may file a petition with the Board in the same manner as if a notice of deficiency had been mailed after the enactment of this Act in respect of a deficiency in a tax imposed by this title. In such cases the 60-day period referred to in subdivision (a) of section 274 of this Act shall begin on the date of the enactment of this Act, and the powers, duties, rights, and privileges of the Commissioner and of the person entitled to file the petition, and the jurisdiction of the Board and of the courts, shall, whether or not the petition is filed, be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section.

* * * * * *

(e) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax, (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section.

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the Courts, shall be determined, and the computation of the

tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivisions (d) of section 284).

(g) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner after June 2, 1924, finally determined the amount of the deficiency, and notified the person liable for such tax to that effect less than 60 days prior to the enactment of this Act and no appeal has been filed before the enactment of this Act, the person so notified may file a petition with the Board in the same manner as if a notice of deficiency had been mailed after the enactment of this Act in respect of a deficiency in a tax imposed by this title. In such cases the 60-day period referred to in subdivision (a) of section 274 of this Act shall begin on the date of the enactment of this Act, and, whether or not the petition is filed, the powers, duties, rights, and privileges of the Commissioner and of the person, who is so notified, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax be made, in the same manner as provided in subdivision (e) of this section.

* * * * * *

(j) In cases within the scope of subdivision (b) or (f) of this section where any hearing before the Board has been held before the enactment of this Act and the decision is rendered after the enactment of this Act such decision shall, for the purposes of this title, be considered to have become final upon the date when it is rendered and neither party shall have any right to petition for a review of the decision. The Commissioner may, within one year from the time the decision is rendered, begin a proceeding in court for the collection of any part of the amount disallowed by the Board, unless the stat-

utory period of limitations properly applicable thereto has expired before the appeal was taken to the Board. The court shall include in its judgment interest upon the amount thereof in the same cases, at the same rate, and for the same period, as if such amount were collected otherwise than by proceeding in court. In any such proceeding by the Commissioner or in any suit by the taxpayer for a refund, the findings of the Board shall be *prima facie* evidence of the facts therein stated.

* * * * * *

(1) In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision (b) of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court.

Sec. 284. (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint

or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Such refund or credit shall be made either (1) if claim therefor was filed within the period of limitation provided for in subdivision (b) or (g), or (2) if the petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by this Act, within three years after the tax was paid.

For provisions similar to the above as to the determination of Federal estate taxes see Secs. 308, 310, 318 and 319.

Sec. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

"TITLE IX.—BOARD OF TAX APPEALS

"MEMBERSHIP OF BOARD

"Sec. 900. The Board of Tax Appeals (hereinafter referred to as the 'Board') is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

"Sec. 901. (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to

perform the duties of the office. Members of the Board may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each member shall receive salary at the rate of $10,000 per annum.

"(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth year, four at the end of the tenth year, and four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

"Sec. 902. A member of the Board removed from office in accordance with subdivision (a) of section 901 shall not be permitted at any time to practice before the Board.

"Organization and Procedure

"Sec. 903. The Board shall at least biennially designate a member to act as chairman. The Board shall have a seal which shall be judicially noticed.

"Sec. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.

"Sec. 905. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division, respectively.

"Sec. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear and decide any proceeding instituted before the Board and any motion thereon assigned to such division by the chairman.

"(b) In case of a decision by a division, the decision and the findings of fact made in connection therewith shall become the decision and the findings of the Board within 30 days after such decision by the division, unless within such period the chairman has directed that such decision shall be reviewed by the Board.

"(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the pleadings.

"(d) A decision of the Board shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of

the Board. If the Board dismisses a proceeding and is unable from the pleadings to determine the amount of the deficiency determined by the Commissioner, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

"(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax.

"(f) The findings of the Board made in any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be *prima facie* evidence of the facts therein stated.

"Sec. 907. (a) Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public and shall be stenographically reported. The Board is authorized to contract for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The mailing by registered mail of any pleading, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, order, notice, or process.

"(b) It shall be the duty of the Board and of each division to make findings of fact and a decision in each case before it, and report thereon in writing; except that the findings of fact and report thereon may be omitted in case of a decision dismissing any proceeding upon

motion either of the taxpayer, the Commissioner, or the Board. Whenever the Board deems it advisable, the report shall contain an opinion in writing in addition to the findings of fact and decision.

"(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

"(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

"(e) The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States The times and places of the meetings of the Board and of its divisions shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

"(f) The Secretary of the Treasury shall provide the Board with suitable rooms in courthouses or other build-

ings when necessary for hearings by the Board, or any division thereof, outside the District of Columbia.

"WITNESSES

"Sec. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent.

"Sec. 909. (a) Any witness summoned or whose deposition it taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

"(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

"(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

"(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926.

"EXPENDITURES AND PERSONNEL

"Sec. 910. The members of the Board shall receive necessary traveling expenses, and expenses actually in-

curred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be applicable to the Board of General Appraisers. The employees of the Board shall receive their necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, in an amount not to exceed $5 per day. The Board is authorized in accordance with the civil service laws to appoint, and in accordance with the Classification Act of 1923 to fix the compensation of, such employees, and to make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodicals), as may be necessary efficiently to execute the functions vested in the Board. All expenditures of the Board shall be allowed and paid, out of any moneys appropriated for the purposes of the Board, upon presentation of itemized vouchers therefor signed by the chairman. All fees received by the Board shall be covered into the Treasury as miscellaneous receipts. Section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Board when the aggregate amount involved does not exceed the sum of $25.

"FRIVOLOUS APPEALS TO BOARD

"Sec. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax."

"Sec. 1001. (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of

Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

(c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts or additions to the tax provided for by law, or (2) has filed a jeopardy bond under Title II or Title III of the Revenue Act of 1924 or of this Act. It as a result of a waiver under subdivision (d) of section 274 or subdivision (d) of section 308 any part of the amount determined by the Board is paid after the filing of the review bond such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, or, if collection has not been made, shall be abated.

(e) Nothing in subdivision (c) shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review."

"VENUE

"Sec. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

"JURISDICTION

"Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accord-

ance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

"Sec. 1004. (a) The Circuit courts of Appeals, the Court of Appeals of the District of Columbia, and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay.

(b) The Board is authorized to fix a fee, not in excess of the fee fixed by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing a transcript of the record."

"DATE ON WHICH BOARD'S DECISION BECOMES FINAL

"Sec. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the

Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time of such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

(e) As used in this section—

(1) The term 'Circuit Court of Appeals' includes the Court of Appeals of the District of Columbia;

(2) The term 'mandate,' in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate."

4. *Provisions of Revenue Act of 1928* (Act May 29, 1928, c. 852, 45 Stat. 795, U. S. C. Title 26, c. 24.)

"SEC. 504. SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS.

(a) Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

'(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.'

(b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act."

SEC. 507. OVERPAYMENTS FOUND BY BOARD OF TAX APPEALS.

Section 284(e) of the Revenue Act of 1926 is amended to read as follows:

'(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Unless claim for credit or refund, or the petition, was filed within the time prescribed in subdivision (g) for filing claims, no such credit or refund shall be made of any portion of the tax paid more than four years (or,

in the case of a tax imposed by this title, more than three years) before the filing of the claim or the filing of the petition, whichever is earlier.' "

SEC. 601. BOARD OF TAX APPEALS—PROCEDURE.

Sections 906 and 907(a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows:

'Sec. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

'(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board.

'(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined

by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.

'(d) A of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

'(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax.

'(f) The findings of the Board made in connection with any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be *prima facie* evidence of the facts therein stated.

'Sec. 907. (a) Notice and opportunity to be heard upon any proceeding instituted before the Board shall be given to the taxpayer and the Commissioner, and a report upon the proceeding and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board. If an opportunity to be heard upon the proceeding is given before a division of the Board, neither the taxpayer nor the Commissioner shall be entitled to notice and opportunity to be heard before the Board upon review, except upon a specific order of the chairman. Hearings before the Board and its divisions shall be open to the public, and the testi-

mony, and, if the Board so requires, the argument shall be stenographically reported. The Board is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner. The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, decision, order, notice, or process.

'(b) It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.'"

"SEC. 603. BOARD OF TAX APPEALS—COURT REVIEW OF DECISION.

Subdivisions (c) and (d) of section 1001 of the Revenue Act of 1926 are amended to read as follows:

'(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in

respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

'(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated.' "

5. *Provisions of Revenue Act of 1924*, (June 2, 1924, c. 234, 43 Stat. 254.)

"Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for

the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c) If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector."

"Sec. 277. (b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board."

"TAXES UNDER PRIOR ACTS.

Sec. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277."

"TITLE IX.—BOARD OF TAX APPEALS.

Sec. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the 'Board'). The Board shall be com-

posed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

(b) Each member of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. The term of office of all members who are to compose the Board during the period of two years after the enactment of this Act, shall expire at the end of such period. The terms of office of the first seven members who are thereafter to compose the Board shall expire, two at the end of the fourth year, two at the end of the sixth year, two at the end of the eighth year, and one at the end of the tenth year, after the expiration of such two-year period. The term of office of each such member shall be designated by the President, and the terms of office of their successors shall expire ten years after the expiration of their predecessors' terms, except that any individual appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor, and a member in office at the expiration of the term for which he was appointed may continue in office until his successor is qualified. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason. Each member shall receive a salary at the rate of $7,500 per annum.

(c) No member of the Board appointed for a term beginning after the expiration of two years after the enactment of this Act shall be permitted to practice before the Board or any official of the Bureau of Internal Revenue for a period of two years after leaving office.

(d) The Board shall at least biennially designate a member to act as chairman. The Board shall have a seal which shall be judicially noticed.

(e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312. A majority of the members of the Board or of any

division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division, nor of the remaining members of the Board or division, respectively.

(f) The chairman may from time to time divide the Board into divisions and assign the members thereto, and designate a chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than three members, the chairman may assign other members thereto, or he may direct the division to proceed with the transaction of business. A division shall hear and determine appeals filed with the Board and assigned to such division by the chairman. Upon the expiration of thirty days after a decision by a division, such decision, and the findings of fact made in connection therewith, shall become the final decision and findings of the Board, unless within such period the chairman has directed that such decision shall be reviewed by the Board.

(g) In any proceeding in court under sections 274, 279, 308, or 312, and in any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board shall be *prima facie* evidence of the facts therein stated.

(h) Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe. It shall be the duty of the Board and of each division to make a report in writing of its findings of fact and decision in each case, and a copy of its report shall be entered of record and a copy furnished the taxpayer. If the amount of tax in controversy is more than $10,000 the oral testimony taken at the hearing shall be reduced to writing

and the report shall contain an opinion in writing in addition to the findings of fact and decision. All reports of the Board and its divisions and all evidence received by the Board and its divisions (including, in cases where the oral testimony is reduced to writing, the transcript thereof) shall be public records open to the inspection of the public. The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents. The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board, and of its divisions, shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

(i) For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board may administer oaths, examine witnesses, and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, (2) the taking of a deposition before any designated individual competent to administer oaths under this Act, and (3) the answer in writing under oath to any question of fact submitted. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent. Any witnesses sum-

moned or whose deposition is taken under this subdivision shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(j) The Secretary shall furnish the Board with such clerical assistance, quarters, stationery, furniture, office equipment, and other supplies as may be necessary for the efficient execution of the functions vested in it by this section.

(k) The members and employees of the Board and employees assigned thereto shall receive their necessary traveling expenses, and their actual expenses incurred for subsistence while traveling on duty and away from their designated stations in an amount not to exceed $7 per day in the case of members, and $4 per day in the case of employees. The Board is authorized in accordance with the civil service laws to appoint, and in accordance with the Classification Act of 1923 to fit the compensation of, such employees, and to make such expenditures, including expenditures for personal services and rent at the seat of the government and elsewhere and for law books, books of reference, and periodicals, as may be necessary efficiently to execute the functions vested in the Board, in case such assistants and such expenditures are not suitably provided for by the Secretary under subdivision (j). All expenditures of the Board shall be allowed and paid upon the presentation of itemized vouchers therefor, signed by the chairman, out of any moneys appropriated for the collection of internal-revenue taxes and allotted to the Board, or out of any moneys specifically appropriated for the purpose of the Board. The Board shall be an independent agency in the executive branch of the Government.

APPENDIX B.

List of cases in which Circuit Courts of Appeals have entertained jurisdiction of appeals from the United States Board of Tax Appeals. In all cases where the docket number in the Board of Tax Appeals is lower than 12,343, the petition was filed with the Board prior to February 26, 1926, the date of the enactment of the Revenue Act of 1926.

FIRST CIRCUIT

		Docket No. B. T. A.
Blair *v.* Barton	26 Fed. 2nd 765	12934
Commissioner of Internal Revenue *v.* Old Colony Railroad	26 Fed. 2nd 408 (Certiorari granted Oct. 22, 1928, 731 Ed. 78).	7820
Hamilton *v.* Commissioner of Internal Revenue	24 Fed. 2nd 668	6844
Rhode Island Hospital Trust Co. *v.* Commissioner of Internal Revenue	Decided November 27, 1928	7913

SECOND CIRCUIT

DeLoss *v.* Commissioner of Internal Revenue	28 Fed. 2nd 803	7588
Fraser *v.* Commissioner of Internal Revenue	25 Fed. 2nd 653	6495
Hardwick Realty Co., Inc. *v.* Commissioner of Internal Revenue	Decided December, 1928	10498
The Oswego & Syracuse Railroad Co. *v.* Commissioner of Internal Revenue	Decided November, 1928	8157
Tootal Broadhurst Lee Co. Ltd. *v.* Commissioner of Internal Revenue	Decided January, 1929.	15962

THIRD CIRCUIT

		Docket No. B. T. A.
Bishoff *v.* Commissioner of Internal Revenue	27 Fed. 2nd 91	3993
Saunders *v.* Commissioner of Internal Revenue	Decided Dec. 12, 1928.	10526
Thomas Cronin Co. *v.* Commissioner of Internal Revenue	Docket No. 3880, October Term, 1928	7995
Thompson *v.* Commissioner of Internal Revenue	28 Fed. 2nd 247	6523
Weaver *v.* Blair	19 Fed. 2nd 16	17015

FOURTH CIRCUIT

Gauley Mountain Coal Co. *v.* Commissioner of Internal Revenue	23 Fed. 2nd 574	1463
Kleeson Co. *v.* Blair	28 Fed. 2nd 557	7050; 19116
Lavenstein Corporation *v.* Commissioner of Internal Revenue	25 Fed. 2nd 375	7221
MacCorkle *v.* Commissioner of Internal Revenue	26 Fed. 2nd 247	10912
Wheeling Tile Co. *v.* Commissioner of Internal Revenue	25 Fed. 2nd 455	8733

FIFTH CIRCUIT

Avery *v.* Commissioner of Internal Revenue	22 Fed. 2nd 6	4788
Blair *v.* Mathews Mathews *v.* Blair	Decided Dec. 20, 1928.	9583
Brown *v.* Commissioner of Internal Revenue	22 Fed. 2nd 797	5633; 5634
Carr *v.* Commissioner of Internal Revenue Lee *v.* Commissioner of Internal Revenue	28 Fed. 2nd 551	7403; 7404

		Docket No. B. T. A.
Daniel Brothers Co. *v.* Commissioner of Internal Revenue	28 Fed. 2nd 761	10840
Harry S. Kaufman, Ltd. *v.* Commissioner of Internal Revenue	24 Fed. 2nd 44	8154; 11845
Howard *v.* Commissioner of Internal Revenue	Decided Dec. 20, 1928.	9384
New Orleans Shipwright Co., Ltd. *v.* Commissioner of Internal Revenue	27 Fed. 2nd 214	228; 876; 5111
Reinschmidt *v.* Commissioner of Internal Revenue	28 Fed. 2nd 660	4681
Richmond Hosiery Mills *v.* Commissioner of Internal Revenue	29 Fed. 2nd 262	7763; 3703
S. G. Sample Co., Ltd. *v.* Commissioner of Internal Revenue	23 Fed. 2nd 671	9272
Southport Mill, Ltd. *v.* Commissioner of Internal Revenue	26 Fed. 2nd 17	1676
Zimmern *v.* Commissioner of Internal Revenue	28 Fed. 2nd 769	9951

SEVENTH CIRCUIT

Arthur R. Jones Syndicate *v.* Commissioner of Internal Revenue	23 Fed. 2nd 833	8343
Buttolph *v.* Commissioner of Internal Revenue	Decided Nov. 28, 1928.	6027
Chicago Railway Equipment Co. *v.* Blair	20 Fed. 2nd 10	3964
Dilks *v.* Blair	23 Fed. 2nd 831	12115
Greengard *v.* Commissioner of Internal Revenue	Decided Nov. 30, 1928.	7716

		Docket No. B. T. A.
Kosmerl *v.* Commissioner of Internal Revenue	25 Fed. 2nd 87	8875
Mandel *v.* Blair	26 Fed. 2nd 1019	8633
Metropolitan Business College *v.* Blair	24 Fed. 2nd 176	5717
Reliance Manufacturing Co. *v.* Blair	19 Fed. 2nd 789	16016
Scott *v.* Commissioner of Internal Revenue	Decided Dec. 13, 1928.	10773
The Great Lakes Hotel Corporation *v.* Commissioner of Internal Revenue	Decided Dec. 20, 1928.	1952
The North American Railway Construction Co. *v.* Commissioner of Internal Revenue	27 Fed. 2nd 493	3167
W. S. Bogle & Co., Inc. *v.* Commissioner of Internal Revenue	26 Fed. 2nd 771	2208

EIGHTH CIRCUIT

Conklin-Zonne-Loomis Co. *v.* Commissioner of Internal Revenue	Decided Nov. 24, 1928.	7223; 13461
Denver Live Stock Commission Co. *v.* Commissioner of Internal Revenue	Decided Nov. 24, 1928.	4527
Kendrick Coal & Dock Co. *v.* Commissioner of Internal Revenue	Decided Nov. 7, 1928.	6806
Mastin *v.* Commissioner of Internal Revenue	28 Fed. 2nd 748	3425; 20834
Minnehaha National Bank of Sioux Falls, S. D. *v.* Commissioner of Internal Revenue	28 Fed. 2nd 763	10599
Ruth Iron Co. *v.* Commissioner of Internal Revenue	26 Fed. 2nd 30	7224

NINTH CIRCUIT

		Docket No. B. T. A.
Blair *v.* Roth	22 Fed. 2nd 932 (Certiorari denied April 23, 1928; 277 U. S. 588)	6012
Lassen Lumber & Box Co. *v.* Blair	27 Fed. 2nd 17	3431
Royal Packing Co. *v.* Commissioner of Internal Revenue	22 Fed. 2nd 536	3962

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Ayer, Charles V. *v.* Blair	26 Fed. 2nd 547	6442
Ayer, Frederick *v.* Blair	25 Fed. 2nd 534	8184
Cuyahoga Abstract Title & Trust Co. *v.* Commissioner of Internal Revenue	Decided November 5, 1928	8937
Deering, *et al.*, Executors *v.* Blair	23 Fed. 2nd 975	2299; 16651
Joy Floral Co. *v.* Commisisoner of Internal Revenue	Decided December 3, 1928	8986
Lewis-Hall Iron Works *v.* Blair	23 Fed. 2nd 972 (Certiorari denied May 14, 1928; 277 U. S. 592)	3097
News Publishing Co. *v.* Blair	Decided December 3, 1928	8078
T. B. Hord Grain Co. *v.* Blair	25 Fed. 2nd 536 (Certiorari denied October 15, 1928; 73 L. Ed. 25)	2398; 7291

	Docket No. B. T. A.
The George Feick & Sons Co. *v.* Blair.....26 Fed. 2nd 540.....	8796; 13757; 18644
Wells Fargo Bank & Union Trust Co., *et al.*, Executors, *v.* Blair, Gollober *v.* Blair...26 Fed. 2nd 532.....	3092; 3093
Whitcomb *v.* Blair.....25 Fed. 2nd 528.....	5854
W. K. Henderson Iron Works & Supply Co. *v.* Blair.....25 Fed. 2nd 528.....	518; 3555; 10501.

In the following cases the Circuit Courts of Appeals denied jurisdiction of appeals from the United States Board of Tax Appeals solely on the ground that the hearing had taken place prior to February 26, 1926 (See Section 1001 (a) and Sections 283 (j) and 318 (h) Revenue Act of 1926):

Blair *v.* Curran.....24 Fed. 2nd 390..... (C. C. A. 1st Circuit)	793
Blair *v.* Hendricks.....24 Fed. 2nd 819..... (C. C. A. 2nd Circuit)	4554
Red Wing Linseed Co. *v.* Blair.29 Fed. 2nd 253..... (C. C. A. 8th Circuit)	2862
Siegel *v.* Blair.....25 Fed. 2nd 1022..... (C. C. A. 8th Circuit)	5255
T. C. Power & Brothers Co. *v.* Commisisoner of Internal Revenue .....27 Fed. 2nd 116..... (C. C. A. 9th Circuit)	3740

APPENDIX C.

Opinion Upon Special Judicial Tribunals.

[The following opinion, prepared for the Judiciary Committee of the House of Representatives, was inserted in the Congressional Record by the Chairman of that Committee in connection with the consideration by the House of legislation transferring jurisdiction of patent appeals from the District of Columbia Court of Appeals to the Court of Customs Appeals. It appears in 68 Cong. Rec. pp. 3181-2.]

Congress exercises the function of creating courts under several different grants of power. It is expressly given the power of creating inferior courts to the Supreme Court of the United States in the administration of Federal justice under the grant of Article III of the Constitution. These courts exercise jurisdiction within the borders of each State in all cases described in the third article as judicial power extended by that article to the United States. Congress may create courts to exercise complete jurisdiction over the District of Columbia, as given it by reason of the exclusive governmental jurisdiction that it has over the District vested expressly by the Constitution. Congress may in the same way create courts to exercise complete and exclusive judicial jurisdiction over the Territories of the United States under that provision of the Constitution which gives Congress the right to impose needful regulations over the territory and property of the United States. This latter power is also said by Chief Justice Marshall and others to grow out of the power of the United States as a sovereign to govern the territory which it owns, not in the States. In the same way it may be properly said that were there no third article to the Constitution, the United States as a sovereign Government could create courts to decide cases arising between it and private individuals, to construe and decide questions arising between the Government and such individuals in reference to its own taxes, its

own grants, and in reference to its own debts. In other words, I conceive that without the special grant of power under the third article of the Constitution Congress could exercise the power of a sovereign, create a court of claims to pass on the debts which the United States may owe to individuals, on grants of lands which it may have granted to individuals, to grants of patent rights which it may have granted to individuals, and the construction and decision of cases arising under the customs or internal revenue laws affecting the payment of the revenue which a sovereign must collect in order that it may live. With reference to these latter courts, it may be said that the same rigid rule would not be applied to the functions which Congress may give to them as to whether they shall be purely judicial or not, as has been applied in respect to courts that exercise a Federal jurisdiction under the third article of the judicial power of the United States, as distinguished from the general administration of justice by the States within State borders, which could not exist but for the third article. In this way the Court of Claims, the Court of Customs Appeals, and a court of patents may be easily distinguished from the Supreme Court and its subordinate courts under the third article in respect to limitation to strictly judicial functions.

The Supreme Court and the subordinate courts of the United States, exercising jurisdiction within the several States of the Union, all deal with cases and controversies in the sense of the third article of the Constitution, but as to courts which are not concerned with the exercise of judicial power within or affecting the several States, there is reason to believe that they stand on a different plane, and that as they are brought into being and exist in virtue of the sovereignty of the United States, and of its power to do all that is essential to the effective exercise of a government, such as aiding in the enforcement of the taxation laws, aiding in the administration and enforcement of the public land laws and the Indian laws, and in the ascertainment and determination of claims against the United States and the administra-

tion of the laws relating to the granting of patents, copyrights, and trade-marks, they may be invested with jurisdiction and powers which lie outside of and beyond the controversies and cases which are comprehended by the third article of the Constitution. Illustrations of this will be found in the court of private-land claims, which for many years ascertained and reported the facts respecting conflicting claims to lands jurisdiction over which was ceded to the United States by Mexico, to the special Indian court, which dealt with claims to citizenship of the Five Civilized Tribes in the Indian Territory when Congress was preparing that region for admission to the Union as a State, to the Court of Claims, and especially its power and authority to examine and report on claims, at the instance of either House of Congress or at the instance of any of the executive departments of the Government. In *Gordon* v. *United States* (117 U. S. Appendix 697, 699), Chief Justice Taney said:

> "So far as the Court of Claims is concerned, we see no objection to the provisions of this law, Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress or a head of any of the executive departments."

And while in that and other cases it is held that where the action of such a tribunal is intended to be advisory only, and in aid of legislative or administrative action, there can be no review by the Supreme Court, the cases all recognize that Congress, consistently with the Constitution, may establish special tribunals and clothe them with power to ascertain and decide facts and report them as a basis for legislative or administrative action, without putting them in the form of a controlling judicial judgment.

The case of the *Postum Cereal Co.* v. *California Fig-Nuts Co.*, decided January 3, 1927, following the case of *Keller* v. *The Potomac Electric Power Co.* (261 U. S. 428), which in

turn followed the case of *Baldwin* v. *Howard* (256 U. S. 35), and *Muskrat* v. *United States* (219 U. S. 346), were cases in which the jurisdiction of the Supreme Court of the United States was in question, and it was held that its power and jurisdiction as a court was limited to judicial cases and controversies and could not extend to mere decisions as by a commission or special tribunal created for the purpose of aiding governmental functions, whether legislative or administrative. But these cases would not apply to a Court of Customs and Patent Appeals, to whose jurisdiction Congress may properly add the duties of an administrative tribunal for governmental purposes.

APPENDIX D.

Extracts from Reports of Congressional Committees Relating to the Board of Tax Appeals.

1. REVENUE ACT OF 1926—EXTRACT FROM REPORT OF THE COMMITTEE ON WAYS AND MEANS, HOUSE REPORT NO. 1, 69TH CONGRESS, PAGES 17-21

TITLE X. BOARD OF TAX APPEALS.

The provisions of the revenue act of 1924 creating the Board of Tax Appeals are continued in force with numerous amendments. The board constitutes an impartial tribunal of experts, independent of the Treasury Department, readily available for the determination of tax liabilities as between the Government and the taxpayer. The work of the board has been uniformly praised by taxpayers, tax attorneys, and the Treasury Department. Representatives of the American Bar Association informed the committee that the board functions speedily and definitely, is unhampered by questions of administrative expedience, and renders decisions that are uniformly independent.

* * * * * * *

COURT REVIEW—VENUE.—Under section 912 of the proposed new law the taxpayer is given the right to obtain a review of the board's decision (whether determining a deficiency, dismissing on motion a petition, or assessing damages for frivolous appeal) by the Circuit Court of Appeals of the United States or the Court of Appeals of the District of Columbia. The venue on review in any particular case is designated as follows: (1) In the case of an individual the test is the same as for venue under section 51 of the Judicial Code, except that in the case of the nonresident individual, the decision will be reviewed by the Court of Appeals of the District of Columbia; (2) in the case of partnerships, associations, corporations, trusts, and estates, the review will be

given by the court for the circuit in which is located the office of the collector to whom the return was made, a provision similar to that for venue in suits for refunds; and (3) in the case of nonresident or foreign corporations, the Court of Appeals of the District of Columbia will review the decision. The above provisions as to venue relieve the difficulties involved in joint returns and determination of the principal place of business, and further prevent undue burden upon those circuits embracing States in which a vast number of corporations are organized.

COURT REVIEW.—QUESTIONS OF FACT AND LAW.—The procedure is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the packers and stockyards act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of section 914 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 and subdivision (b) of section 914). The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determina-

tions. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision.

The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, and the performance of the duty in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described. The above principles are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, such as in the importation of merchandise and the admission of aliens, and in adhering to such principles the committee feels that it is establishing an appellate procedure that is unquestionably constitutional.

COURT REVIEW—RULES OF PROCEDURE.—The proceedings on review will be conducted in accordance with rules adopted by the several courts of review. The committee is convinced that it is highly desirable that the rules be as uniform as possible. In a desire not to impose a further burden upon the Supreme Court of the United States, the committee has decided to rely upon the possibility of action by the confer-

ence of circuit judges and upon recommendations submitted to the Circuit Courts of Appeals by the board to secure this uniformity.

COURT REVIEW—FINALITY OF DECISIONS.—Section 916 prescribes the date on which a decision of the board (whether or not appeal thereon is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the commissioners' determination, commences to run upon the day upon which the board's decision becomes final, and inasmuch as the power to make a jeopardy assessment terminates upon the commencement of proceedings to review a decision of the board, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

2. REVENUE ACT OF 1926—EXTRACTS FROM REPORT OF THE COMMITTEE ON FINANCE, SENATE REPORT NO. 52, 69TH CONGRESS.

The report of the Committee on Finance contains substantially the same statements as quoted above from the report of the Committee on Ways and Means, except for modifications and additions shown by the following extracts, and by the extracts hereinafter quoted from the House Conference Statement.

(p. 36) COURT REVIEW—QUESTIONS OF FACT AND LAW.—

* * *

(p. 37) In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts

for the enforcement of an administrative order, or by extraordinary remedy such as injunction, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board.

The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

* * * * * * *

(p. 37) Jury trial need not be granted in the proposed procedure for the reason that the proceeding is not one at common law within the meaning of the provisions of the Constitution. It is of course true in addition that the taxpayer may, by paying his tax and suing the collector for a refund instead of petitioning the board, obtain a jury trial if he desires it.

* * * * * * *

(p. 37) Date on which decision becomes final.—Section 1005 prescribes the date on which a decision of the board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure

must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

3. REVENUE ACT OF 1926—EXTRACTS FROM HOUSE CONFERENCE STATEMENT, HOUSE REPORT NO. 356, 69TH CONGRESS, PAGES 53-55

Amendment No. 141: The House bill fixed the term of office of the members of the Board of Tax Appeals at 14 years. The Senate amendment reduces the term of office to 10 years; provides that no person who has been an employee of the Internal Revenue Bureau shall be eligible to appointment to any vacancy on the board until at least two years have elapsed since such official connection; and provides that the President by failing to fill vacancies may reduce the number of members of the board, if he determines at any time that the full membership is not necessary; and the House recedes with an amendment changing the term of office of members (after the original appointments) to 12 years, and striking out the prohibition with regard to the appointment of employees of the Internal Revenue Bureau and the provision authorizing the President to reduce the number of members of the board.

* * * * * * *

Amendment No. 150: The House bill provided that the decision of the Board rendered after the enactment of this act may be reviewed by the Circuit Court of Appeals or the Court of Appeals of the District of Columbia if a petition for such review is filed by either the commissioner or the taxpayer within 90 days after the decision is rendered. The Senate amendment provides that an appeal should lie to the district court of the district in which the taxpayer resides, if notice of appeal is filed within six months, and that the decision of the district court should be subject to review upon appeal as an ordinary civil action. The Senate amendment also clarifies the provisions of the House bill relating to an appeal which involves the validity of only a part of the defi-

ciency determined by the board; and the House recedes with an amendment providing that the decision of the board rendered after the enactment of this act may be reviewed by a circuit court of appeals or the Circuit Court of Appeals of the District of Columbia (as provided in section 1002) if the petition for such review is filed by either the commissioner or the taxpayer within six months after the decision is rendered; making it clear that the court rules will include rules for the preparation and certification of the record, and making clerical changes.

Amendment No. 151: Under the House bill, in case of a corporation which had failed to make a return, a decision of the board would be reviewed by the circuit court of appeals for the circuit in which is located the office of the collector to whom the corporation should have made the return. The amendment provides that in such case the decision may be reviewed by the Court of Appeals of the District of Columbia, and also provides that the commissioner and the taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court; and the House recedes.

* * * * * * *

Amendment No. 155: The House bill provides that the appellate court shall have power to remand cases to the board for rehearing only if there had been prejudicial error by the board in ruling upon admissibility of evidence. The amendment strikes out this provision and provides that an appellate court may, in modifying or reversing a decision of the board, remand the case for rehearing, as justice may require; and the House recedes.

4. REVENUE ACT OF 1928—EXTRACT FROM REPORT OF COMMITTEE ON WAYS AND MEANS, HOUSE REPORT NO. 2, 70TH CONGRESS, PAGES 30-31.

Sections 601 and 602 make a number of amendments with respect to the procedure of the Board of Tax Appeals.

Under the 1924 Act, no appeal was had from the decision of the Board of Tax Appeals. The Government could sue for the amount of any deficiency allowed by the board and the taxpayer could sue for the amount of any refund by the board. In such suits the findings of fact of the board constituted *prima facie* evidence. Under the 1926 Act the decision of the board is not the basis for court suit. If either party is dissatisfied with the decision, an appeal may be taken but a final decision in the case is binding on both the Government and the taxpayer. In accordance with the new procedure, the findings of the board are no longer *prima facie* evidence in court suits. Neither are such findings necessary as evidence in subsequent proceedings, for on appeal the circuit courts of appeal have available the narrative record of the evidence presented to the board.

The committee is of the opinion that in view of the above considerations, findings of fact are no longer necessary. The record in case of appeals can be prepared properly without a detailing finding of facts, and the board may be relied upon to include in its opinion enough facts to support the legal conclusions reached. It may be, however, that in certain exceptionally complicated cases it would be deemed desirable for the board to make formal findings of fact. Consequently the committee provides that the power to make such findings be not entirely eliminated but left to the board's discretion. The omission of findings of fact would not permit the circuit courts of appeals to substitute their judgment on the facts for that of the board, for under existing law the courts are able to reverse or modify decisions of the board (so far as questions of fact are concerned) only if there is no evidence to support the decision of the board and such decision is therefore arbitrary.

FORCE AND EFFECT OF RULES.—A recent decision by the circuit court of appeals for the seventh circuit indicates that there is some disposition to regard the Board of Tax Appeals

as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The committee is of the opinion that the board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure of the board shall, just as the Federal equity rules, have the force and effect of law.

5. REVENUE ACT OF 1928—EXTRACT FROM REPORT OF COMMITTEE ON FINANCE, HOUSE REPORT NO. 960, 70TH CONGRESS, PAGES 37-38.

SECS. 601-603. BOARD OF TAX APPEALS.

MODIFICATION OR REVERSAL OF BOARD DECISION.—In view of certain expressions in a recent court opinion, the House bill in section 601 provides that no decision of the board shall be modified or reversed because the board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the board for subsequent proceedings in accordance with law, the existing provisions of law clearly contemplate judicial, not administrative, procedure on the part of the board and the committee can see no need of further legislation on this subject. It is not the duty of the board to make investigations of tax cases but to decide the case on the basis of evidence properly placed before it by the commissioner and the taxpayer.

6. REVENUE ACT OF 1928—EXTRACTS FROM HOUSE CONFERENCE STATEMENT, HOUSE REPORT NO. 1882, 70TH CONGRESS, PAGES 21-22.

Amendment No. 183: The House bill provided that no decision of the board should be modified or reversed because of its failure to consider evidence not adduced before it in evidence. The existing law is clear that the board need not consider evidence not properly placed before it and that it need not conduct independent investigations of the facts of cases pending on its docket. In view of this, the Senate eliminated the House provisions; and the House recedes.

FILED
APR 15 1926

Supreme Court of the United States,

OCTOBER TERM, 1925.

No. 130.

OLD COLONY TRUST COMPANY, *et al., Executors*

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Certificate from the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR OLD COLONY TRUST COMPANY ON QUESTIONS STATED IN ORDER FOR REARGUMENT.

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Supreme Court of the United States,

OCTOBER TERM, 1928

OLD COLONY TRUST COMPANY, *et al.* Executors, AGAINST COMMISSIONER OF INTERNAL REVENUE	No. 180.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR OLD COLONY TRUST COMPANY ON QUESTIONS STATED IN ORDER FOR REARGUMENT.

This brief is filed in answer to the questions of the Court in the order announced February 18, 1929, restoring the cause to the docket for reargument. A copy of the order is attached as "Appendix A". This brief is confined to the questions stated in the Court's order for reargument and avoids repetition of arguments made in our *original brief* on the merits and our *supplemental brief* on the jurisdiction question, requested by the Court after the arguments on the merits.

Statement of the Case.

The only change in the certificate, amended pursuant to the suggestion in the order, is to include in the first paragraph a statement of dates of the steps in the proceedings below in this case. Such paragraph now reads:

> "This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, the Commissioner of Internal Revenue notified Mr. Wood by registered mail of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The amount of this deficiency was revised by the Commissioner's letter of August 18, 1925. On August 22, 1925, an appeal was taken to the Board of Tax Appeals. In response to an order to make petition more definite and certain, an amended petition was filed October 27, 1925. The hearing before the Board of Tax Appeals was held April 11, 1927, and the decision of the Board of Tax Appeals was rendered November 12, 1927. The Board of Tax Appeals approved the action of the Commissioner and found a deficiency in the federal income tax of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review in this Court of the decision of the Board of Tax Appeals, pursuant to the Revenue Act of 1926 and Rule 38 of this Court, was perfected December 23, 1927."

This case, therefore, is one in which the petition was filed in the Board before the passage of the Revenue Act of 1926 and the hearing before the Board was after the passage of that act.

The remainder of the certificate, setting forth the facts giving rise to the question on the merits, is set forth in the Commissioner's brief on the merits (pp. 6-8).

Propositions Discussed and Summary of Argument.

The answers to the questions of the Court here submitted by counsel for the taxpayer are as follows:

I. There was power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals.

A. The Board of Tax Appeals was created by Congress to furnish independent determination of tax liabilities before payment, and the review of its decisions by the Circuit Courts of Appeals is an essential part of the Congressional plan.

B. Congress has power to provide for review by the Circuit Courts of Appeals of any "case" or "controversy."

C. The proceedings to review action of the Board of Tax Appeals present to the Circuit Court of Appeals for decision a "case":

The subject matter of the proceedings—tax determination—is a proper one for judicial cognizance.

The judgment of the Circuit Court of Appeals is effective as the final and indisputable basis of action by the parties.

Judgments in proceedings instituted after passage of 1926 Act determine the rights of both parties in respect of all taxes for the year involved in the proceeding.

Judgments in proceedings instituted before but heard after passage of 1926 Act determine the rights of the parties as to the "deficiency".

A "case" is presented by the review proceedings whether the Board be regarded as a "judicial" or as an "administrative" tribunal and whether the review proceeding be regarded as appellate or original in the Circuit Court of Appeals.

II. The Circuit Court of Appeals apparently acts as a tribunal of appellate jurisdiction in considering appeals from the Board of Tax Appeals, but even if the jurisdiction of such court is original, the Court may certify to this Court questions deemed necessary for the proper decision of a pending cause. Answering such questions is an appellate function.

III. The practice of taxing officials where, by agreement between the parties, the tax liability upon income actually received by one of them has been paid by another, has varied. In tax-free covenant bond cases the practice finally adopted was to add no amount to the income received by the bondholder. In other cases apparently some amount has been added to the income received by the taxpayer, but varying methods of computing such amount have been used, and the practice has not been uniform, long-continued, or generally acquiesced in.

IV. The applicable statutes do not authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties.

Provisions of Constitution and Statutes.

The provisions of the Constitution and the statutes deemed material to the question of jurisdiction raised by the Court are set forth in Appendix A of our supplemental brief and also in Appendix A of the supplemental brief for the Commissioner.

The statute authorizing the certifying of questions, Title 28 of the United States Code, Section 346, 43 Stat. 938, provides:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the Court at any time may certify to the

Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

I. There was power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals.

A. The Board of Tax Appeals was created by Congress to furnish independent determination of tax liabilities before payment, and the provision for the review of its decisions by the Circuit Courts of Appeals is an essential part of the Congressional plan.

Under the statutes relating to the Board of Tax Appeals as existing since the enactment of the Revenue Act of 1926, the taxpayer is given a right to an independent determination of the amount of any disputed Federal income or estate tax liability before he is required to make payment, and to a final court adjudication of any relevant question of law. Before the Board of Tax Appeals was created, there was no way in which a taxpayer could avoid paying any amount which might be demanded by the Commissioner of Internal Revenue as additional income or estate taxes. (*Graham* v. *Dupont,* 262 U. S. 234, Section 3224 R. S.) His only remedy was through a claim for refund and suit in court after payment.

With the imposition of very heavy taxes in 1917 and thereafter, the amount of which often turned on difficult

questions of fact and law, there frequently resulted demands for enormous sums in excess of those set forth by taxpayers on their returns as the amounts properly due. Justice required a change in Federal tax procedure so that there could be an independent determination before payment of additional demands was exacted.

The Board of Tax Appeals was established by Congress under the Revenue Act of 1924 to meet this need. It is described in the statute as "an independent agency in the executive branch of the Government". As existing since 1926, it is composed of 16 members appointed for definite terms by the President by and with the advice of the Senate. (Sections 900, 901*.) The Board functions like a court in determining the amount of income or estate taxes due to the Government from a particular taxpayer. The Board's jurisdiction is invoked by a petition from a taxpayer attacking a determination of the Commissioner as to an amount claimed (called the "deficiency") in excess of that shown on the taxpayer's return (Sections 274, 308). The detailed provisions are set forth in our supplemental brief (pp. 4-7) which also shows the power of Congress to create such a body with such powers (pp. 10-13).

The Board decisions are made final and conclusive except for the court review on appeal. The Board enters an order determining the amount of the deficiency in accordance with its findings of fact and opinion. A deficiency disallowed by the Board cannot be collected; any overpayment by the taxpayer found by the Board must be credited or refunded by the Commissioner, and it is the duty of the Commissioner to collect any amount found due by the Board. (Sections 274 (b), 284 (e).) It is further provided that in cases instituted after the 1926 Act, no claim for refund can be allowed and no suit maintained in respect of the taxable year involved. (Section 284(d).)

---

*Section references are to Revenue Act of 1926, c. 27, 44 Stat. 10, except where otherwise noted.

After the Board has rendered its decision, either the Commissioner or the taxpayer may file a petition for review by a Circuit Court of Appeals or the Court of Appeals of the District of Columbia. (Section 1001(a).) The courts are authorized to adopt rules for the filing of petitions and conduct of proceedings, and such rules have been adopted substantially in the form recommended by the conference of the Senior Judges, presided over by the Chief Justice of the Supreme Court, held on September 17, 1926. (Section 1001(b).) Upon such review, the Circuit Courts of Appeals are given power:

> "to affirm, or if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for rehearing, as justice may require." (Section 1003(b).)

The jurisdiction of such courts to review decisions of the Board is "exclusive", except as provided in Section 239 of the Judicial Code; and the judgment of any such court "shall be final", except upon certiorari from this court. (Section 1003(a).)

We are advised that the practice is for the Circuit Court of Appeals to enter an order that the decision of the Board be reversed, affirmed, or modified, or the case remanded to the Board for further proceedings, and directing the clerk to issue the proper mandate. The order and mandate are in form similar to those issued upon review by such courts of a judgment of a district court.

The status of the Board and of its decisions since the enactment of the Revenue Act of 1926 differs from that under the Revenue Act of 1924, which originally created the Board, and which was considered by this Court in *Blair* v. *Oesterlein* (1927), 275 U. S. 220; *Williamsport Wire Rope Co.* v. *U. S.* (1928), 277 U. S. 551. Under the 1924 Act the deficiency determined by the Board was asssessed and collected but the taxpayer could file a claim for refund and if such claim were denied sue for recovery of the tax. (Section

281, Revenue Act of 1924; Section 3226 R. S.) If the Board disallowed the deficiency claimed by the Commissioner, the Commissioner could not assess or distrain but could sue for such deficiency without assessment. (Section 274 (b), Revenue Act of 1924.) In such court proceedings the case was tried *de novo* but the Board's findings of fact were *prima facie* evidence of the facts. (Section 900 (g), Revenue Act of 1924.)

Under the Revenue Act of 1926, however, the decision of the Board, unless reversed or reviewed by the courts, is final and conclusive on the parties, as above set forth.

With respect to petitions filed before but heard after the passage of the 1926 Act, as in the case at bar, the statute provides that

> "the powers, duties, rights and privileges of the Commissioner and of the person who brought the appeal, and the jurisdiction of the Board and of the courts shall be determined * * * in the same manner"

as in other cases, except that the prohibition (Section 284 (d)) against any refunds or suits in respect of the taxable year is inapplicable. (Section 283 (b).) The effect of this exception is discussed *infra*, pp. 17-19.

Without provision for court review, the Congressional purpose of the Board of Tax Appeals could not be accomplished. Congress in undertaking to provide for independent review of additional tax liabilities before payment, by the changes adopted in the light of experience under the 1924 Act, indicated its purpose that such determination should be made final for all purposes, and that it should at the same time be kept in harmony with determinations effected by the earlier method of review through the courts after payment, still left open to taxpayers as an alternative. Decisions of the Board of Tax Appeals could not be made final unless subject to court review, without subjecting both the Government and the taxpayer to the consequences of possible errors of law by the Board and to the danger that two interpretations of the law might develop, one through the Board and another through court interpretation in refund cases.

Congress was not satisfied to leave decisions in Board proceedings as merely *prima facie* evidence in court as under the 1924 act. It desired to make them "final", and that plan and the relief thereby afforded to the Government and to taxpayers from twice litigating the same issues must fail if the provisions for court review are held to be invalid. Congress made the Board decisions final *subject to the court review provided*, and it is clear that Congress had no intention of making Board decisions final *without that review*.

A decision that the provisions for court review are invalid would thus also cast grave doubt upon the validity of all the provisions relating to the Board of Tax Appeals. A decision that the provisions for court review, although valid generally, are invalid in respect of proceedings instituted before but heard after the 1926 Act, likewise would cast grave doubt upon the status of the Board and the rights of the Government and the taxpayers. Some of the extremely serious practical consequences of any such decision are pointed out on pages 22-25 of our supplemental brief. Clearly such a decision would put in doubt the status with regard to the statute of limitations of all taxes involved in Board proceedings.

B. Congress has power to provide for review by the Circuit Courts of Appeals of any "case" or "controversy".

As Circuit Courts of Appeals are "inferior courts" of the United States, Congress has power under Article III of the Constitution to invest them with jurisdiction, either original or appellate, of any proceeding which presents for decision by them a "case" or "controversy". The extent, nature and form of jurisdiction which may be confererd upon them rests in the unfettered discretion of Congress.

Stevenson v. *Fain* (1904), 195 U. S. 165, 167;
Mayor v. *Cooper* (1867), 6 Wall, 247, 251;
Insurance Company v. *Dunn* (1873), 19 Wall 214, 226.

This Court has said, referring to this clause of the Constitution:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall receive such a form that the judicial power is capable of acting on it." (*La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 456.)

C. The proceedings to review action of the Board of Tax Appeals present to the Circuit Court of Appeals for decision a "case".

The general rule as laid down by this Court is that

> "Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." (*Tutun* v. *United States* (1926), 270 U. S. 568.)

The decisions of this court establish that the following elements are essential to a "case": adverse parties (*South Spring Mining Co.* v. *Amador Medean Gold Mining Company* (1892), 145 U. S. 300); an actual controversy and not merely moot or abstract questions (*Muskrat* v. *United States* (1911), 219 U. S. 346-361); a matter which is a proper subject of judicial cognizance (*Keller* v. *Potomac Electric Company* (1923), 261 U. S. 428, 444; *Postum Cereal Company* v. *California Fig-Nut Company* (1927), 272 U. S. 693); a decision which is a final and indisputable basis of action of the parties (*La Abra Silver Mining Company* v. *United States* (1899), 175 U. S. 423, 456-7; *Gordon* v. *United States* (1864), 117 U. S. 697; *In re Sanborn* (1893), 148 U. S. 222). The leading cases establishing these elements are reviewed in *Willing* v. *Chicago Auditorium Association* (1928), 277 U. S. 274.

Upon a petition to the Circuit Court of Appeals to review Board action there are obviously adverse parties—the Commissioner representing the Government asserting a tax—a money demand—and a particular taxpayer resisting such demand. There can also be no doubt that there is presented a real and actual controversy. Nor can there be any doubt that the matter arises in proceedings regularly established by Congress for the determination of the controversy.

The discussion will therefore deal with the three phases of the question which seem to merit consideration, *i. e.,* whether the subject matter is one for judicial cognizance; whether the judgment is "final", and whether the fact that the proceeding for review originates out of proceedings in the Board of Tax Appeals, and is in form appellate presents any difficulty.

(1) *The subject matter of the proceeding—tax determination—is a proper one for judicial cognizance.*

Proceedings of a Circuit Court of Appeals to review action of the Board (in cases other than special assessment) present to the court the same subject matter as a suit for the refund of a tax—always a "case" or "controversy". The matter presented to such court in this case is identical with that presented in the companion case of *United States* v. *Boston & Maine Railroad.*

The subject is obviously not the determination of a mere administrative matter, such as that dealt with by this court in *Postum Cereal Company* v. *California Fig-Nut Company, supra,* where it was held that a decision of the Commissioner of Patents refusing to cancel the registration of a trade mark, was administrative, and that therefore determination of the correctness of the Commissioner's action did not present a case for the constitutional courts.

In respect of matters of tax determination, however, it is clear that they constitute the proper subject matter of judicial cognizance when "put in such form that the judicial

power can act upon them." This is the effect of the opinion of the Court in the leading case of *Murray's Lessee* v *Hoboken Land and Improvement Co.* (1855), 18 Howard 272. In the course of a thorough discussion it was stated that while there could lawfully be an administrative determination of whether a customs collector was indebted to the United States, there could be no doubt that this same question might be one of judicial cognizance when the United States has so consented, and that though such consent might have been withheld, when such consent is given,

> "nothing which may not be a subject of judicial cognizance is brought before the court" (p. 284).

In the case at bar the United States has consented to the proceeding in the Board of Tax Appeals with review by the Circuit Court of Appeals.

The case so presented is very closely analogous to the cases as to customs duties arising under the Customs Administrative Act of 1890 and before the changes effected by the Act of May 7, 1908 (35 Stat. 406) and subsequent acts. The Board of General Appraisers had jurisdiction to decide cases as to the rate and amount of duties chargeable upon imported merchandise, and its decision was final and conclusive except for review in the Circuit Court of the United States (subsequently in the Circuit Court of Appeals). No question was raised as to the validity of this procedure during the many years it was in effect, and this court and the lower Federal courts passed upon many cases.

U. S. v. *Lies* (1898), 170 U. S. 628, particularly page 636;
Marshall Field v. *Clark* (1892), 143 U. S. 649.

See also
U. S. v. *Stone & Downer Co.* (1927), 274 U. S. 225.

(2) ***The judgment of the Circuit Court of Appeals is effective as the final and indisputable basis of action by the parties.***

(a) *Judgments in proceedings instituted after passage of 1926 Act determine the rights of both parties in respect of all taxes for the year involved in the proceeding.*

There is no basis for doubt that the effect of a judgment of the Circuit Court of Appeals upon a petition filed after the passage of the 1926 Act is finally to adjudicate the rights of the parties in a manner meeting all requirements as to finality of judgments in "cases".

The statutory provision as to the jurisdiction of the Circuit Court of Appeals and the nature of its judgment, applicable to all review cases, is as follows:

> "The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in Section 239 of the Judicial Code as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 240 of the Judicial Code as amended." (Section 1003(a).)

It is hard to see that there could be any want of finality in a judgment rendered by a court having exclusive jurisdiction under a statutory provision declaring that such judgment shall be "final". "Final" as here used clearly refers to the character of the judgment, not to the time when the judgment becomes effective.

The statute provides effective machinery by which the judgment becomes the indisputable basis of action of the parties. The decision of the Board if found by the court not to be in accordance with law is modified or reversed by the court. (Sec. 1003(b).) The decision of the Board which has been the subject of the review proceedings, if not modified or reversed, becomes "final" (in this connection referring to time and meaning "effective") upon the expiration of the time allowed for filing a petition for certiorari. (Sec. 1005(a) (2) and (4).) If the decision is to be modified or reversed in accordance with the mandate of the Supreme

Court on certiorari or the judgment of the Circuit Court of Appeals "the decision rendered in accordance with the mandate * * *" becomes final after thirty days unless the taxpayer has instituted proceedings to have the decision corrected so it will accord with the mandate, in which event the decision of the Board becomes final when so corrected. The decision of the Board when so made to accord with the judgment of the Court in review proceedings must then be carried out by administrative officers and submitted to by the taxpayer. Thus Section 274(b) provides:

> "the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment."

If the decision is that the taxpayer has overpaid, the amount of such overpayment must be credited or refunded as provided in the statute. [Sec. 284(e).]

There is, of course, no execution in these cases, but execution is never used as against the Government. In that respect the procedure is similar to that in Court of Claims cases, where judgment is to be paid pursuant to mandatory statutory duties out of appropriations by Congress. (Section 1089, R. S.) In suits against collectors for the recovery of taxes, execution is specifically prohibited where there was probable cause. The amount of the judgment shall be "provided for and paid out of the proper appropriation from the Treasury". (Section 989, R. S.)

Nor is execution necessary as against the taxpayer. The Commissioner having made an assessment against the taxpayer for the amount of the deficiency determined by Board decision, as he is expressly required to do, can of course collect by distraint and is required to make collection. The taxpayer cannot enjoin such collection.

It seems clear also that even apart from the provision in the Act referred to below, prohibiting suit by the taxpayer, the taxpayer could not after payment maintain a claim or suit based on grounds rejected by the Circuit Court of Appeals in the review proceedings. In any such suit he would be met by the express provision of the Act that the decision of the Court of Appeals "*shall be final*".

It is obvious that a judgment having the conclusive effects above described is not subject to any objection of want of finality as in the case of *Gordon* v. *United States* (1864), 117 U. S. 697, and that it furnishes the indisputable basis of action between the parties as clearly as the judgment of the Court of Claims in *La Abra Silver Mining Company* v. *United States* (1899), 175 U. S. 423, 456-7, held by this court to be sufficient. The decision in *Fidelity National Bank* v. *Swope*, 274 U. S. 123, also shows that execution is not essential to "finality" of a judgment. In that case this court held that an intermediate judicial review of administrative proceedings, to be followed by further administrative action, constituted a case where the judgment of the court, without execution, was the final basis for further administrative action. See also *Tutun* v. *United States* (1926), 270 U. S. 568, 576-7.

The statute makes the further provision, applicable in cases where the Board petition was filed after the 1926 Act, that:

> "* * * *no credit or refund in respect of the tax for the taxable year* in respect of which the Commissioner has determined the deficiency shall be allowed or made and *no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court* * * *" (with certain exceptions not here material). (Sec. 284 (d).) (Italics ours.)

This section of course prevents any re-litigation of the matters involved in the judgment of the Circuit Court of Appeals, but is much broader than that and prevents further litigation of any matter whatever "in respect of the tax

for the taxable year". This prohibition carries out the policy, evidenced by other provisions of the statute, of making any tax board proceeding instituted after the 1926 Act, with the specified court review, a proceeding for adjudication of all matters relating to taxes for the year involved. As above indicated, however, the prohibition was not necessary to assure finality of judgments of the Circuit Court of Appeals in review cases in respect of matters actually adjudicated.

(b) *Judgments in proceedings instituted before but heard after the 1926 Act determine the rights of the parties as to the deficiency asserted.*

When the 1926 Act was passed, petitions were pending before the Board of Tax Appeals under the Revenue Act of 1924. Under the 1924 Act the Board could deal only with the additional tax or deficiency asserted by the Commissioner, and petitions filed under that act were directed merely to the resistance of the particular deficiency asserted. There was no provision for court review and a decision by the Board was not final but the findings of the Board were merely *prima facie* evidence in court proceedings which might be brought by either party.

Congress provided that the provisions of the 1926 Act should govern petitions filed under the 1924 Act, but not heard until after the passage of the 1926 Act, and that

> "the powers, duties, rights and privileges of the Commissioner and of the person who has brought the appeal and the jurisdiction of the Board and of the courts shall be determined * * * in the same manner"

as in other cases, except that the prohibition against any refunds or suits in respect of the taxable year shall not apply. (Section 283 (b).) Reasons for the non-application of this prohibition are indicated below.

It results that in these cases brought under the 1924 Act, but heard after the passage of the 1926 Act (as the case at

bar), a judgment of the Circuit Court of Appeals is final under the same provisions as are applicable in cases instituted after the 1926 Act, and also that the same statutory machinery applies here for putting the judgment of the court into operation as the indisputable basis of the action of the parties.

It has been suggested, however, that there may be lack of finality in decisions in these cases, on the ground that the taxpayer, not being subject to the prohibition of Section 284(d), may file a claim or bring suit for refund, and in such subsequent proceeding relitigate the matters previously adjudicated by the Circuit Court of Appeals in the review proceedings. This suggestion is unfounded. The mere absence of a prohibition against a suit or claim gives rise to no affirmative right, and any attempt to relitigate the same issue in another proceeding would be defeated by the application of the statutory provision that the judgment of the Circuit Court of Appeals shall be "final". Litigation against the Government for recovery of taxes can be maintained only with the consent of Congress. What basis would there be for holding that a second suit could be maintained where Congress has consented to a procedure for court determination in which the jurisdiction of the court is exclusive and its judgment "shall be final"?

Any such suggestion rests on a misconception of the purpose and effect of the prohibition of Section 284(d), not applicable in this class of cases, but applicable in other cases. What that section prohibits is *making of any claim* or the maintenance of *any* suit in respect of *any tax whatsoever for the taxable year involved in the petition to the Board.* It carries out the purpose of the statute that a petitioner who goes to the Board after the 1926 Act must have *all questions* as to his tax liability settled in that proceeding. This was a matter of policy, not a matter essential to finality of the review proceeding. Congress did not require that petitioners who already had petitions pending when the 1926 Act was passed convert their proceedings for

the resistance of a deficiency into proceedings for determining all questions affecting tax liability for the taxable year. The cause presented by such proceedings was left a cause to prevent the collection of that deficiency unless enlarged by amendment.

The excepting of those petitioners from the prohibition of Section 284(d) leaves them free to maintain suits or claims on grounds not presented in the Board proceedings for resistance of a particular deficiency. Resistance of a particular deficiency or additional tax asserted by the Commissioner is not the only cause which may arise as to taxes for the year involved. Other controversies might arise, as is illustrated by the case of the Old Colony Railroad Company, No. 407, being heard with this case. No. 407 is here on review of a tax board determination of a "deficiency" of $765.66, turning on the question whether certain premiums on bonds constitute income for 1920. The same taxpayer has a suit against the United States for refund of all original tax paid for 1920 on the ground that its return should have been consolidated with that of its lessee, the New York, New Haven & Hartford R. R. The Court has held, and we believe correctly, that such suit, involving matters different from those presented in the Board proceedings, may be maintained. *Old Colony Railroad Company* v. *United States* (1928), 27 Fed. (2d) 992; see *Emery Executor* v. *United States* (1928), 27 Fed. (2d) 994.

Should a subsequent suit by or against the taxpayer with respect to taxes for the year involved in Board proceedings of this class, which had been the subject of review, present or turn upon any matter which was presented to the Circuit Court of Appeals in the review proceedings, it is our belief that the provision that the judgment of the Circuit Court of Appeals is final would conclude the parties in respect of that matter. The effect of the "final" judgment of the Circuit Court of Appeals would be similar to the application which must be given to any judgment of a competent court under the principles of *res adjudicata*. Where the same

cause is presented as was previously adjudicated, the prior judgment operates as an absolute bar, but where the cause is different the prior judgment is conclusive, as between the parties, in respect of the matters actually adjudicated.

Cromwell v. *County of Sac* (1876), 94 U. S. 351;
Troxell v. *Del. Lack. & West. R. R.* (1913), 227 U. S. 434;
United States v. *California Bridge Co.* (1917), 245 U. S. 337;
United Shoe Mach. Co. v. *United States* (1922), 258 U. S. 451.

The principles of *res judicata* would apply in any suit between the taxpayer and the United States as to the taxes involved in a review proceeding between the taxpayer and the Commisioner, as the United States is the real party in the latter proceeding.

Minnesota v. *Hitchcock* (1901), 185 U. S. 373;
Oregon v. *Hitchcock* (1905), 202 U. S. 60;
Louisiana v. *McAdoo* (1914), 234 U. S. 627.

There has never been, to our knowledge, any express statutory prohibition against claims or second suits for refund of taxes based on identical grounds rejected in a prior suit in court for refund, but it would not be suggested that the judgment in the first suit lacked finality. The effectiveness of such judgments to prevent second suits results not from statute but from application of the principles of *res adjudicata*. For stronger reasons a judgment, which under the statute is made in the exercise of "exclusive jurisdiction" and is "final" will effectively prevent re-litigation of the issues presented. The United States having consented to one such final judgment, there can be no basis for holding that general provisions consenting to tax litigation operate as a consent to any subsequent re-adjudication of such issues. (See pp. 20-21, Supplemental Brief.)

We may add that even if it could be held that the matters adjudicated by the Circuit Court of Appeals could be relitigated in the event that the decision was favorable to the Government, the decision of the Circuit Court of Appeals in the cause presented to it is sufficiently final for the purpose of a "case".

There is no requirement that a judgment in a tax case must necessarily determine the rights of the parties in such manner "that they could never again be litigated". The decision of the Circuit Court of Appeals in the case at bar certainly has the same results as the granting or denial of a permanent injunction in respect of the collection of taxes. If against the Government, the injunction is permanent. If against the taxpayer, the tax must be collected. Even aside from the construction which must be given to the statutory provision that the judgment shall be "final", its results are sufficient for the presentation of a "case". An analogous situation was dealt with in the leading case of *Weston* v. *City of Charleston*, 2 Peters, 449. See particularly the remarks of Chief Justice Marshall on page 464. The decision in that case established the law.

Mt. Vernon Cotton Co. v. *Alabama Power Co.* (1916), 240 U. S. 30;

Detroit, Etc., Ry. Co. v. *Michigan R. R. Co.* (1916), 240 U. S. 564;

Cf. *Sage* v. *United States* (1919), 250 U. S. 33.

A judgment of the Circuit Court of Appeals *favorable to the Commissioner* in a case instituted before but heard after the 1926 Act, therefore, not only imposes the duty of collection of the deficiency asserted but also is conclusive as between the parties on the merits of the issues presented in respect of that "deficiency". We have already pointed out that in this class of cases *if the judgment of the Circuit Court of Appeals is favorable to the taxpayer,* such judgment is undoubtedly conclusive. The Commissioner is prohibited from collecting the "deficiency".

It results that the judgment of the Circuit Court of Appeals reviewing action of the Board is a final and binding adjudication of the cause presented whether the case be one in which the proceeding was instituted in the Board before or after the passage of the 1926 Act.

(3) *A "case" is presented by the review proceedings whether the Board be regarded as a "judicial" or as an "administrative" tribunal and whether the review proceedings be regarded as original or appellate in the Circuit Court of Appeals.*

In our supplemental brief, we have set forth grounds for the view that the Board of Tax Appeals is a "legislative tribunal" properly exercising a judicial function, and that so regarded review of its decisions by the Circuit Court of Appeals is proper (pages 10-16). There is no requirement that a case originate in a "constitutional" court. Such review has been long sustained in the case of decisions of the state courts (*Martin* v. *Hunter* [1816], 1 Wheat. 304) and has also been sustained in cases which had their origin in state administrative tribunals (*Boom Company* v. *Paterson* [1879], 98 U. S. 403; *Road District* v. *St. Louis, Southwestern R. R. Company* [1922], 257 U. S. 547). It is also sustained in cases originating in courts of the District of Columbia, which are not "constitutional" courts, although decisions of such courts cannot be reviewed where the matter presented is not a "case" (*Keller* v. *Potomac Electric Company* [1923], 261 U. S. 428). This court can review action of the Court of Claims in cases where the court exercises judicial powers, although not where it exercises non-judicial power (*Degroot* v. *United States* [1866], 5 Wall. 419, 427; *Gordon* v. *United States, supra*). Review by this court of decisions of the Court of Private Land Claims, which was not a "constitutional" court, was similarly sustained (*United States* v. *Coe* [1894], 155 U. S. 76).

We have also indicated in the supplemental brief our view that the review by the Circuit Courts of Appeals is proper, even if the Board of Tax Appeals is to be regarded as an "administrative" tribunal authorized to make a decision judicial in nature (pp. 15-19). It is established by the decisions there referred to that decisions of such tribunals in the exercise of such powers may properly be reviewed by the "constitutional" courts in proceedings *de novo* "denominated appeals for want of a better term" (*Stephens* v. *Cherokee Nation* [1879], 174 U. S. 445, 447).

It is also established that there may be review of such decisions by proceedings in substance appellate. No suggestion has been made that the procedure by which appeals from decisions of the Board of General Appraisers were reviewed by the "constitutional" courts was invalid, although the court proceeding was held to be an "appeal" in substance.

United States v. *Lies*, 170 U. S. 628, 636.

The decision in this case seems directly to sustain the review provided for in the statute under consideration. The similarity of the statutes in respect of the Board of Tax Appeals and of the Board of General Appraisers when this case arose is well pointed out in the brief of the Bar Association (pp. 33-37).

Additional reason for sustaining the review in this case is found in the fact that it is limited to questions of law. There can be no doubt that the review is so limited. The statute clearly contemplates such limitation (Section 1003(b)); the legislative history shows that such was the Congressional intent (S. Rept. No. 52, 69th Cong. pp. 36-7); and the Circuit Courts of Appeals have unanimously held that their function is to pass on questions of law, the findings of fact of the Board being conclusive if supported by evidence.

Blair v. *Curran*, 24 Fed. (2d) 390 (C. C. A. 1st);

Luscomb v. *Commissioner*, (not yet reported, Feb. 18, 1929, C. C. A. 2nd);

Bishoff v. *Commissioner*, 27 Fed. (2d) 91 (C. C. A. 3rd);

Avery v. *Commissioner,* 22 Fed. (2d) 6 (C. C. A. 5th);

Brown v. *Commisioner,* 22 Fed. (2d) 797 (C. C. A. 5th);

Bogle v. *Commissioner,* 26 Fed. (2d) 771 (C. C. A. 7th);

Kendrick Coal & Dock Co. v. *Blair,* 29 Fed. (2d) 559 (C. C. A. 8th);

Feeder's Supply Co. v. *Commissioner,* (not yet reported. Feb. 20, 1929, C. C. A. 8th);

Royal Packing Co. v. *Commissioner,* 22 Fed. (2d) 536 (C. C. A. 9th).

There is no difference in substance between such review by the Circuit Courts of Appeals of Board decisions and the review by them of orders of the Federal Trade Commission. The validity of the latter review is not questioned. (See pp. 17-19 supplemental brief.)

The effect of limiting the court review to questions of law is emphasized by the opinion of this court in *Keller* v. *Potomac Electric Company,* 261 U. S. 428, where it was held that the complete review on questions of law and fact in respect of decisions of the District of Columbia Utilities Commission did not present a "case". It was urged that the situation in that case was similar to review by the courts of matters arising in the Federal Trade Commission and the Interstate Commerce Commission. The court pointed out that the review of action of both those tribunals is confined to questions of law, and indicated that such a review does not bring the court "too intimately into the legislative machinery". (261 U. S. 442.) The review in respect of the Federal Trade Commission is "appellate and revisory". (*Federal Trade Commission* v. *Eastman Kodak Company,* (1927) 274 U. S. 619.) The review of Interstate Commerce Commission orders is in a proceeding in form original. It seems to follow that the form of a procedure for review of

such action by an "administrative tribunal" is not material so long as the court's function on review is confined to deciding questions of law.

This is particularly true where the decision below, even if regarded as that of an "administrative" tribunal, is as clearly judicial in character as the decision of the Board.

> *Blair* v. *Oesterlein Machine Company* (1927) 275 U. S. 220, 226.

The decision of the Board deals with a subject matter undoubtedly of judicial cognizance—a controversy between adversary parties—turning upon the application of existing law as to past transactions. It is presented in regular proceedings provided for by law. The tribunal proceeds in the manner of a court on pleadings, with both parties represented, holding open hearings and determining the facts on the basis of evidence introduced before it in a regular way under legal rules of evidence. The tribunal makes an effective determination of the controversy, with findings of fact and rulings on questions of law. That the Circuit Court of Appeals in review proceedings passes only upon questions of law, of course, does not prevent what is before the court from being a "case" in the constitutional and judicial sense. The questions before the court have the same aspect as on stipulated facts or demurrers. Under the procedure provided in the statute both parties have elected to have the Board find the facts as warranted by the evidence—the taxpayer through electing to file his petition and the United States by establishing the statutory procedure. The terminology used by Congress in providing for review proceedings of such cases is, of course, not controlling on questions of constitutional power.

From the standpoint of constitutional power there is no substantial difference between such a control by the Circuit Court of Appeals of Board action on questions of law, and the review which the courts from time immemorial have exercised over the action of inferior tribunals—boards or the like—not in the regular judicial system, by writ of

certiorari. A case in the court on application for such a writ is perhaps original in the sense of the beginning of the "cause" but it is in substance appellate in that what is involved is a limited review of action of the inferior tribunal, usually on questions of law.

The Circuit Court of Appeals' review of action of the Board of Tax Appeals, therefore, presents no constitutional difficulty whether such review be regarded as involving an original or an appellate proceeding and whether the Board be regarded as an "administrative tribunal" making decisions judicial in nature, instead of a "legislative tribunal" exercising judicial power.

II. The Circuit Court of Appeals apparently acts as a tribunal of appellate jurisdiction in considering appeals from the Board of Tax Appeals, but even if the jurisdiction of such Court is original, the Court may certify to this Court questions deemed necessary for the proper decision of a pending cause. Answering such questions is an appellate function.

A. The Circuit Court of Appeals apparently acts as a tribunal of appellate jurisdiction in considering appeals from the Board of Tax Appeals.

It is the essential characteristic of appellate jurisdiction that it deals with a proceeding in a cause already instituted, but does not create that cause.

Marbury v. *Madison* (1803), 1 Cranch 137, 175;
The Alicia (1868), 7 Wall. 571, 573;
Baltimore & Ohio R. R. Co. v. *I. C. C.* (1909), 215 U. S. 216, 225.

It seems to follow that the determination of whether the Circuit Court of Appeals acts as a tribunal of original or appellate jurisdiction within the above understanding, depends upon the nature of the *Board*. If the Board is a legislative tribunal exercising a judicial function, as contended in our supplemental brief (pp. 10-16), the "cause" apparently originates in the Board and, hence, the Circuit Court of Appeals acts as a tribunal of appellate jurisdiction. If the Board is an administrative tribunal making decisions judicial in nature, presumably the "cause" with which the Court deals is created in that Court and, hence, it acts as a tribunal of original jurisdiction.

In form the proceeding is undoubtedly appellate. The Court's function is

> "to affirm, or if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for rehearing, as justice may require." (Section 1003(b).)

The rules relating to appellate proceedings upon writ of errors so far as applicable, were to govern pending adoption by the Courts of other rules. (Section 1001(b).) The case is not tried *de novo;* no new evidence is introduced; and the findings of fact of the Board are conclusive if supported by the evidence.

This Court has held that the jurisdiction of the Circuit Court of Appeals is "appellate and revisory" under the analogous provisions for review of orders of the Federal Trade Commission. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619.

If the Board acts as a legislative tribunal exercising a judicial function, it therefore, seems clear that the Circuit Court of Appeals acts as a tribunal of appellate jurisdiction revising and correcting the decision below instead of creating the "cause". Certifying questions by the Circuit Court of Appeals in cases within its appellate jurisdiction is of course proper.

B. Even if the Circuit Court of Appeals acts as a tribunal of original jurisdiction, certifying questions is proper. Answering such questions is an appellate function.

It is clear, we submit, that the *statutes* as they now stand *provide* for certifying to this Court by the Circuit Courts of Appeals of questions deemed necessary for the proper decision of a pending appeal from the Board of Tax Appeals.

Title 28 of the United States Code, Section 346 (*supra*, p. 5), referred to by this Court, provides that the Circuit Courts of Appeals may certify questions

> "in any case, civil or criminal",

and that the Supreme Court may give binding instructions or require that the entire record be sent up for consideration. This statute is usually referred to as Section 239 of the Judicial Code.

Section 239 of the Judicial Code, as in effect prior to the amending act of February 13, 1925 (43 Stat. 938), changing it to read as above, limited the power to certify questions to cases within the

> "appellate jurisdiction as defined in Section one hundred and twenty-eight".

The omission of this limitation in the general revision of the statutes as to federal procedure in the Act of February 13, 1925, of itself, would seem sufficient to establish that no limitation to appellate cases was intended by the amended statute, particularly as in terms it is applicable to "any case".

It is possible that the omission of the limitation to appellate cases was not made with express reference to the contingency that some cases might be regarded as "original" in the Circuit Court of Appeals. It seems clear, however, that the purpose was to confer jurisdiction to certify in *all* cases of which the Circuit Court of Appeals had jurisdiction

without regard to their technical classification. (See report of hearing before sub-committee of the Committee on the Judiciary, United States Senate, February 2, 1924, pages 7, 9, 12, 13, 18 and 28 [particularly page 13]; see also report of hearing before Committee on the Judiciary, House of Representatives, December 18, 1924, page 15.)

The amending act of February 13, 1925, itself contains express provisions for the application of the certification section to the direct review by the Circuit Courts of Appeals of orders of the Federal Trade Commission and certain matters arising in the Interstate Commerce Commission and the Federal Reserve Board. Upon such reviews, the Circuit Courts of Appeals act as "tribunals of original jurisdiction" at least to the same extent as upon the review of Board of Tax Appeals action. (Section 348, Title 28, U. S. Code, as amended May 20, 1926, c. 347, Section (b), 44 Stat. 578; Section 45, Title 15, U. S. Code; Section 21, Title 15, U. S. Code.) There was no Circuit Court of Appeals' review of Board of Tax Appeals decisions when the Act of February 13, 1925, was passed, but the statute providing for such review expressly refers to Section 239, as applicable. (Section 1003(a).) It is apparent, therefore, that the statutes provide for certifying questions arising upon review of Board action.

We are unable to see that the provision for certifying questions in cases to review Board action pending in the Circuit Court of Appeals, even if regarded as original in that Court, presents any constitutional difficulty. The mere answering of questions so certified will not be the exercise of original jurisdiction by this Court. The function of answering questions has always been considered appellate.

See

Dow v. *Johnson* (1879), 100 U. S. 158, 163;
Columbus Watch Company v. *Robbins* (1893), 148 U. S. 267, 269;
United States v. *Rider,* 163 U. S. 132, 135.

Under the Judiciary Act of 1802 (Act of April 29, 1802, c. 31, 2 Stat. 156, 157), providing for certifying questions upon division of opinion in the Circuit Courts, questions were commonly certified in original cases before judgment.

Ogden v. *Blackledge* (1804), 2 Cranch 272;
United States v. *Gurney* (1808), 4 Cranch 333;
Sergeant's Lessee v. *Biddle* (1819), 4 Wheat. 508;
Miller v. *Stewart* (1824), 9 Wheat. 680;
Bank of United States v. *Owens* (1829), 2 Pet. 527;
Kirkman v. *Hamilton* (1832), 6 Pet. 20;
City of New York v. *Miln* (1837), 11 Pet. 102;
Ex Parte Milligan (1866), 4 Wall. 2.

It is only when the original case is transferred to this court prior to judgment that the action of this court can be deemed original. *Baltimore & Ohio Railroad Company* v. *I. C. C.* (1909), 215 U. S. 216, 224; *White* v. *Turk,* 12 Peters 238, 239; *Webster* v. *Cooper,* 10 Howard 54, 55.

No question as to the validity of the provision of the present statute that this Court may call up the entire record arises. No attempt has here been made to certify the entire case, nor has the Court suggested that it is necessary. Under the decisions, it would perhaps not be within the constitutional power of this Court to call up the record in this case if regarded as original in the Circuit Court of Appeals. There is, however, ample scope for the exercise of the power to call up the record conferred by the statute, where questions are certified in cases in which the Circuit Court of Appeals is exercising appellate jurisdiction. The fact that a statute applied in certain circumstances would be unconstitutional, does not affect the validity of the statute in its application to other circumstances.

Dahnke-Walker Co. v. *Bondurant* (1921), 257 U. S. 282, 289;
Dorchy v. *Kansas* (1926), 272 U. S. 306, 309.

See also

United States v. *Coe* (1894), 155 U. S. 76, 83.

It is respectfully submitted, therefore, that even if the Circuit Court of Appeals acts as a tribunal of original jurisdiction in this connection, the mere certifying of the questions is authorized by the statute and presents no constitutional difficulty.

III. The practice of taxing officials where, by agreement between the parties, the tax liability upon income actually received by one of them has been paid by another, has varied. In tax-free covenant bond cases the practice finally adopted was to add no amount to the income received by the bondholder. In other cases apparently some amount has been added to the income received by the taxpayer, but varying methods of computing such amount have been used, and the practice has not been uniform, long-continued, or generally acquiesced in.

So far as is shown by published regulations, rulings and decisions, the practice of the Bureau of Internal Revenue has been as follows:

In cases where the obligor of a bond agreed to pay some part of the income tax of the bondholder on the interest, the practice of the Bureau of Internal Revenue from 1913 to 1918 was to require the bondholder to report the full interest received, but it did not require him to add to the interest received the income tax thereon paid for him by the obligor of the bond.

Article 6, Regulations 33 (1914);
Article 122, Regulations 33 (1918).

By Article 31 of Regulations 45 (April, 1919), the Commissioner held that income tax paid for the bondholder by the obligor of such a bond was in the nature of additional

interest and should be included in the gross income of the bondholder. The Circuit Court of Appeals for the Third Circuit decided such income tax was not in fact income to the bondholder.

Duffy v. *Pitney,* 2 F. (2d) 230 (1924); Certiorari denied, 267 U. S. 595.

The Commissioner, by T. D. 3685 (1925) modified Article 31 of Regulations 45 to conform to the court decision. This was the final determination as to the practice which should be followed for the years 1913 to 1920. For 1921 and subsequent years the Revenue Acts have specifically provided that no income tax paid for the bondholder by the obligor of tax-free covenant bonds should be added to the income of the bondholder.

Section 234(a)(3), Revenue Acts of 1921, 1924, and 1926;
Section 144(a)(4), Revenue Act of 1928.

The Commissioner held that the ruling that income tax paid at the source was not income of the taxpayer applied only to tax-free covenant bond cases.

S. M. 3570, IV-2 C. B. p. 35.

In cases where the lessee of property agreed to pay rent and to pay any income tax of the lessor on such rent, it seems to have been the practice of the Commissioner to add some amount to the rent received by the lessor, but varying methods of computing such amount have been used. The formal regulations of the Bureau of Internal Revenue do not deal specifically with the treatment of such tax payments. They do provide generally that taxes paid by a tenant for his landlord are gross income of the landlord and are taxes deductible by him. As income taxes are not deductible, this regulation clearly was not intended to apply to income taxes.

Article 4 (par. 57), Regulations 33, (Rev.);

Article 109, Regulations 45 and 62;
Article 110, Regulations 65 and 69;
Article 130, Regulations 74.

Since January 2, 1918, the regulations have likewise provided:

> "When a corporation shall have leased its property in consideration that the lessee shall pay in lieu of rental an amount equivalent to a certain rate of dividend on its capital stock or the interest on its outstanding indebtedness, together with taxes, insurance or other fixed charges such payments shall be considered rental payments and shall be returned by the lessor corporation as income, notwithstanding the fact that the dividends and interest are paid by the lessee direct to the stockholders and bondholders of the lessor."
>
> *Article 102,* Regulations 33 (Rev.);
> *Article 456,* Regulations 45;
> *Article 547,* Regulations 62, 65 and 69;
> *Article 70,* Regulations 74.

The incidental reference to taxes in this regulation does not indicate that any consideration was given to the special problems arising from the shifting of the incidence of the income tax itself.

The Commissioner has used at least three methods of computation in estimating the amount to be added to the rent accruing to the lessor for any year by reason of the obligation of the lessee to pay the income tax thereon. These different methods are not consistent.

(a) In some cases, as in the case of *Commissioner of Internal Revenue* v. *Old Colony Railroad* (No. 407), the Commissioner has added to the income received only the initial tax thereon. Thus, in No. 407 the Commissioner increased accrued income for 1920 by $6,960.64 on account of the amortization of the bond premium, and added to income a further amount of $696.06.

> "on the theory that the income tax of 10% should be computed upon the amount of $6,960.64 mentioned

above, and that this tax, if payable by the petitioner's lessee under the terms of the lease, constituted additional income to the petitioners". (R. No. 407, p. 8.)

The deficiency in the lessor's income tax asserted was $765.67, but only part of this amount, payable by the lessee, was added to the lessor's income. This method of computation was also used by the Commissioner in the following cases:

Appeal of Providence & Worcester Railroad, 5 B. T. A. 1186;

Appeal of Norwich & Worcester Railroad Co., 2 B. T. A. 215;

Vermont & Massachusetts Railroad Company v. *Commissioner,* 8 B. T. A. 500;

Manchester & Lawrence Railroad v. *Commissioner,* 8 B. T. A. 506.

(b) In some cases, as in the case of *United States* v. *Boston & Maine Railroad* (No. 129), the Commissioner added to the rent accrued for the taxable year not only the initial tax on such rent, but the secondary tax on the initial tax, the tertiary tax on the secondary tax, etc. In No. 129 the initial tax of 6% on the actual rent for 1917 was $61,422.06 but the Commissioner added to 1917 income the amount of $65,342.61. (R. No. 130, p. 2.) The $65,342.61 was 100/94ths of $61,422.06, and the effect of this computation was that the Commissioner added to income the initial tax of $61,422.06, the 6% income tax thereon of $3,685.32, and the 6% income tax thereon of $211.12, etc., thus "pyramiding" the tax and assessing a tax on a tax.

The same method was followed by the Commissioner in *Appeal of American Telegraph & Cable Company,* 2 B. T. A. 991.

(c) In one case the Commissioner used a hybrid method, pyramiding so far as the income tax was concerned, but not attempting to pyramid with respect to excess profits tax. In this case the Commissioner computed the income and excess profits tax for 1917 by taking 100/94ths of the rent ac-

crued for 1917, added the tax so computed to income and then recomputed the income and excess profits taxes. The result was that the Commissioner added $41,400.28 to income, although the lessee was actually called upon to pay $42,010.60 and the initial tax on the rent accrued would have been but $36,603. *Concord & Montreal Railroad* for 1917, a companion case in the District Court to No. 129. See page 28 of Record in the Circuit Court of Appeals for the First Circuit in *United States* v. *Boston & Maine Railroad.*

In the case of taxpayers on a cash basis, such as the *Old Colony Trust Company* case (No. 130), the Commissioner added to the income of the taxpayer only the income tax actually paid by someone else in the taxable year. In No. 130 the amount added was the initial income tax on the employee's salary and it is not possible to tell from any published ruling whether the Commissioner would hold that the employee realized further income if the employer paid not only the initial tax on the salary, but also the secondary tax on the initial tax.

In A. R. M. 16, C. B. 2, p. 62 (Jan. 1920) it was held, with no discussion, that where the vendee of property had agreed to pay the vendor's income tax on any gain on the sale, the amount of income tax paid by the vendee was income of the vendor for the year in which paid. We are advised that this ruling was later revoked by an unpublished ruling, and still later was reinstated.

In view of this varying practice, the principle that the courts will give weight to a uniform, long continued and generally acquiesced in administrative construction of an ambiguous statute, has no application here.

United States v. *Healy,* 160 U. S. 136;
Iselin v. *United States,* 270 U. S. 245;

Even if there had been a uniform departmental practice, that would not, of course, determine the court's decision as to the meaning of the term "income".

Eisner v. *Macomber,* 252 U. S. 189;

United States v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189;
Merchants Loan & Trust Co. v. *Smietanka*, 255 U. S. 509;
Gould v. *Gould*, 245 U. S. 151.

IV. The applicable statutes do not authorize taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties.

There is no provision of the applicable statutes authorizing taxing officers to estimate total income at any amount in excess of the income received by or accruing to the taxpayer for the taxable year, or to add any amount thereto. The statute governing in No. 130 (Revenue Act of 1918), merely imposes a tax on "the net income of every individual". (Section 210.) "Net income" is defined as "gross income" less statutory deductions. (Section 212(a).) "Gross income" is defined to include rent, salaries, wages and compensation for personal services, and gains, profits or income from any source whatever. (Section 213.) There is no specific provision as to whether income tax paid for the taxpayer by the payor of his income, is itself income, and the only provision dealing specifically with such income taxes is Section 234(a)(3), which denies to corporate obligors of bonds any deduction for income taxes paid for bondholders pursuant to a tax-free covenant in such bonds.

The Commissioner's authority is to determine the correct amount of income and the tax thereon pursuant to the statute. (Section 250(b); Section 1305.) The Commissioner is given discretion to estimate reasonable deductions in the case of depreciation, depletion and amortization, (Section 214(a)(8)(9)(10)) but is nowhere given author-

ity to estimate items of gross income in any case. The Commissioner cannot by regulation or practice modify or enlarge the statutory measure of the tax.

Morrill v. *Jones*, 106 U. S. 466;
United States v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571.

The method of accounting employed is unimportant except to determine whether an item of income shall be taxed in the year received or the year accrued, and never operates to make an item income in any year which is never received or accrued. (Section 212(b).)

Our original brief, pages 4 to 28, sets forth the argument showing that income tax paid by another under agreement is not income of the taxpayer within the meaning of the statute, and that retaining income undiminished by an income tax is not to be treated as the receipt of more income.

Respectfully submitted,

ARTHUR A. BALLANTINE,
GEORGE E. CLEARY,
Attorneys for Old Colony Trust Company *et al.*, Executors.

Appendix "A".

Order announced by the Chief Justice,
Monday, February 18, 1929.

No. 130. Old Colony Trust Company *et al.*, Executors, *v.* Commissioner of Internal Revenue.

"It is ordered that the above cause be restored to the docket for reargument. The Court especially desires assistance of counsel in respect of the following matters:

1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?

2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when considering appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court questions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

It is suggested that counsel apply to the Court below for an amendment so that the certificate will show distinctly when the original assessments were made, and under what acts. Also when the appeals were taken to the Board of Tax Appeals; when they were there decided; and when the appeals to the Circuit Court of Appeals were perfected.

And it is further ordered that case No. 407, Commissioner of Internal Revenue *v.* Old Colony Railroad, be assigned for argument with the above entitled cause on Monday, April 15 next."

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 129.

UNITED STATES OF AMERICA
v.
BOSTON & MAINE RAILROAD.

On Certificate from the United States Circuit Court of Appeals for the First Circuit.

MEMORANDUM BRIEF FOR THE BOSTON & MAINE RAILROAD ON REARGUMENT.

STATEMENT.

This case is now before the Court upon reargument, pursuant to the Order of February 18, 1929. The Order recites that the Court especially desires assistance of counsel in respect of the following matters:

1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?

2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when considering appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, Sec. 346, certify to this Court questions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

This case originated in the United States District Court for the District of Massachusetts, and hence the first two questions are without application here. Those questions are fully dealt with in numerous briefs filed in Case No. 130 (*Old Colony Trust Company et al., Executors*, v. *Commissioner of Internal Revenue*).

There can be no doubt that upon an appeal from the judgment of a United States District Court the Circuit Court of Appeals acts as a tribunal of appellate jurisdiction, and that a case is presented under Title 28, United States Code, Section 346, in which the Circuit Court of Appeals is authorized to certify any questions deemed necessary for its proper decision.

The questions upon the merits are:

1. The primary question, certified by the Circuit Court of Appeals: whether the payment by the Boston & Maine Railroad, lessee, pursuant to the terms of its lease, of the Federal income taxes assessed against the Fitchburg Railroad Company, lessor, constituted additional taxable income to the latter; and

2. The corollary question: whether if the payment of such tax be regarded as additional taxable income, resulting in an additional or secondary tax, that secondary tax, being equally payable by the lessee, constitutes in turn further additional income to be subjected to a tertiary tax, and so on *ad infinitum* —or whether the first tax paid by the lessee is income to the

lessor, but the secondary tax, though equally payable by the lessee, is not income.

These questions are indicated in the fourth point shown above, upon which the Court has shown a desire for the assistance of counsel. With respect to them reference is respectfully made to the principal brief filed on behalf of the Boston & Maine Railroad in this case.

The third point indicated by the Court in its Order of February 18, 1929—what has been the practice of taxing officers in cases of this type?—has been the subject of much discussion between counsel for the Government and counsel for the taxpayer, since the entry of the Order of February 18, but we regret that we have been unable to come to agreement with the Government as to the facts.

Counsel for the Government in their Memorandum Brief for the United States on Reargument indicate these facts only by reference to their Brief for the Commissioner of Internal Revenue on Reargument in No. 130. In that brief, under "III. Taxes paid by another for the benefit of the taxpayer have consistently been regarded by the taxing officers as additional income to the taxpayer" (p. 28), they make certain statements, based upon a letter dated April 2, 1929, from the Commissioner of Internal Revenue, which is printed as Exhibit C (p. 53) of that brief. We regret that we can not concede the accuracy of those statements in the brief and letter, and feel sure that the Commissioner, who, as a matter of course, must have relied upon information furnished by subordinates, would not have signed said letter if his attention had been called to certain facts within our knowledge as counsel for certain taxpayers, and further facts of which we have been advised by counsel for other taxpayers.

A.

It has not been the Uniform Practice of the Bureau to Treat Taxes Paid, Under Agreement Between the Parties, by One for Another, as Income to the Latter.

The Commissioner's letter refers to Treasury Decision 2620 (Dec. 17, 1917) as the first published ruling on this question. That Treasury Decision was a reprint of the opinion of the Circuit Court of Appeals in *West End Street Railway* v. *Malley*, 246 Fed. 625. That case dealt wholly with *dividends* paid by the lessee to the stockholders of the lessor, and had nothing to do with taxes paid by the lessee. We have shown the distinction between that case and this in our first brief. It constituted no basis for injecting taxes (at least not Federal income taxes) into Art. 102 of Regulations 33, Revised, and Art. 109 of Regulations 45, quoted in the Commissioner's letter (pp. 54, 55). The Bureau applied these regulations to many taxpayers, including those whose taxes were paid (to the extent of the two per cent directed by the statute to be *withheld*) by obligors under tax free covenant bonds. But after this Court denied certiorari in *Duffy* v. *Pitney*, 2 Fed. (2d) 230, the Bureau ceased to apply the theory in tax free covenant bond cases, while inconsistently continuing to apply it in most lessor-lessee cases. The argument urged by the Government in *Duffy* v. *Pitney* was identical with that presented here, and its authorities—*West End Street Railway* v. *Malley* and similar cases—were also the same there and here. But, upon defeat in the courts in its efforts to apply those *dividend* cases to taxes, it reversed itself only with respect to tax free covenant bond cases, and not to the other cases in which it had relied on the same theory and the same decisions.

The Bureau's rulings were never accepted generally by taxpayers—as is evidenced by the fact that this Boston & Maine case involves a tax for 1917—the very first year for which the Government ever applied the theory to taxes—and there are numerous other similar 1917 cases pending in the courts, as well as numerous similar cases covering subsequent years.

The Memorandum of the Committee on Appeals and Re-

view, cited in the Commissioner's letter (p. 55) as A. R. M. 16; C. B. 2, p. 62, is the only *published* ruling on this subject. It deals with a contract for the sale of goods, entered into on July 20, 1917 (distinguishable, as shown in our first brief, from the lease in this case which was made prior to the Sixteenth Amendment). This A. R. M. 16, published in May, 1920, was originally a letter to a certain taxpayer, dated January 6, 1920—changed only to render the corporations concerned unidentifiable. Under date of June 2, 1920, the then Commissioner wrote to the taxpayer's counsel, saying, in part:

> "The theory that the amount of tax paid on behalf of the M Company is income to that company rests upon the assumption that it is an increased amount of compensation. However, in the present case, it is apparent that a literal application of the principles stated in office ruling of January 6th would result in the payment of an aggregate tax grossly disproportionate to the amount to which it attaches in the first instance, and would entail endless accounting readjustments.
>
> "It clearly is the intent of the Act to levy a tax upon profits, and not to tax *ad infinitum* the amount received by one party to a contract under an agreement by the other party to reimburse him to the extent of the Federal taxes assessed upon the profits derived from the contract.
>
> "That it is held, therefore, the amount of Federal taxes levied upon the profits growing out of the contract between the P Company and the M Company, and paid by the former company in accordance with its agreement with the M Company to pay such taxes, shall not be deducted from gross income of the P Company and shall not be included in the gross income of the M Company, provided the taxable net income of both parties to the contract are subject to the same rate of taxation.
>
> "Office ruling of January 6, 1920, is hereby reversed."

We understand that in 1922 or 1923 the Bureau again reversed itself in this case—but at a time when the bankruptcy of the taxpayer rendered it necessary to close the case on the basis of a compromise rather than a computation. Neverthe-

less, between the first and second reversals of position, the same counsel represented another (and a very large) taxpayer with a similar question, and his tax for 1918 was closed on the basis of the language quoted above from the letter of June 2, 1920.

Not having access to the Bureau's records, we can not say how many other instances of inconsistency occurred, but those cited constrain us to deny that the Bureau has been consistent in treating taxes paid by one for another as income to the latter.

At this point we wish to call the attention of the Court to the language of the preamble printed on the cover and on the first page of the Internal Revenue Bulletins. This preamble, as it has been printed since early in 1924, is quoted in full at pp. 7–8 below. At least the first paragraph of it appeared in the Bulletin containing A. R. M. 16. And in that paragraph we find

> "* * * rulings other than Treasury Decisions [A. R. M. 16 not being a Treasury Decision] having none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. * * * It is especially to be noted that the same result will not necessarily be reached in another case unless all the material facts are identical with those of the reported case. * * * there can be no assurance that any new case is identical with the reported case. * * *"

We call attention to the fact that no published Treasury Decision or other decision approved and promulgated by the Secretary of the Treasury, other than the ambiguous "Regulations" quoted in the Commissioner's letter, has ever upheld the proposition contended for by the Government.

B.

The Bureau has not been Consistent, Even Since 1923, in the Method of Application of its Theory.

As shown in the Commissioner's letter (p. 56) and in the appendix to our first brief herein,the Bureau seems to have been in doubt as to whether to apply its theory to its logical conclusion, leading in cases of large incomes to monstrous results, or whether to depart from logic and say the first tax is income but the secondary tax thereon is not income—and thus partially to repeal the statute (if their construction of it were sound). The Commissioner's letter (p. 56) says that on April 30, 1923, general instructions were issued to all branches of the Bureau in Memorandum A. R. R. No. 3181 for the purpose of establishing a consistent policy. We shall show that, even if this was done, it did not result in a consistent policy, and that in the light of *published* instructions it could not, and that departure from the A. R. R. was *not* unauthorized.

A. R. R. 3181 was an unpublished decision rendered in the case of the *Providence & Worcester Railroad*, for whom counsel for the taxpayer in the instant case happen also to be counsel. The preamble to the Internal Revenue Bulletins, mentioned above, reads as follows (italics supplied):

> "The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Bureau of Internal Revenue; the *rulings other than Treasury Decisions having none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury.* Each ruling embodies the administrative application of the law and Treasury Decisions to the entire state of facts upon which a particular case rests. *It is especially to be noted that the same result will not necessarily be reached in another case unless all the material facts are identical* with those of the reported case. As it is not always feasible

to publish a complete statement of the facts underlying each ruling, *there can be no assurance that any new case is identical with the reported case.* As bearing out this distinction, it may be observed that the rulings published from time to time may appear to reverse rulings previously published.

"*Officers of the Bureau of Internal Revenue are especially cautioned against reaching a conclusion in any case merely on the basis of similarity to a published ruling,* and should base their judgment on the application of all pertinent provisions of the law and Treasury Decisions to all the facts in each case. These rulings should be used as aids in studying the law and its formal construction as made in the regulations and Treasury Decisions previously issued.

"In addition to publishing all Internal Revenue Treasury Decisions, *it is the policy of the Bureau* of Internal Revenue *to publish all rulings* and decisions, including opinions of the General Counsel for the Bureau of Internal Revenue, *which,* because they announce a ruling or decision upon a novel question or upon a question in regard to which there exists no previously published ruling or decision, or *for other reasons, are of such importance as to be of general interest.* It is also the policy of the Bureau to publish all rulings or decisions which revoke, modify, amend, or affect in any manner whatever any published ruling or decision. In many instances opinions of the General Counsel for the Bureau of Internal Revenue are not of general interest because they announce no new ruling or no new construction of the revenue laws but simply apply rulings already made public to certain situations of fact which are without special significance. It is not the policy of the Bureau to publish such opinions. Therefore, the numbers assigned to the published opinions of the general Counsel for the Bureau of Internal Revenue are not consecutive. *No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Bureau of Internal Revenue as a precedent in the disposition of other cases.* Unless otherwise specifically indicated, all published rulings and decisions have received the consideration and approval of the General Counsel for the Bureau of Internal Revenue."

In the light of the unequivocal prohibition, to all officers and employees of the Bureau, against relying upon any unpublished

ruling as a precedent, how could the Bureau be expected to be consistent in following unpublished A. R. R. 3181? How could any departure therefrom be "unauthorized"? How could the officers of the Bureau obey the mandate of the preamble quoted above and give any effect to A. R. R. 3181?

A. R. R. 3181 is set forth in full—for we think the portions thereof which we italicise may be of interest to the Court in considering the merits of this case:

> "The Committee has had under consideration the appeal of the Providence & Worcester Railroad Company, Providence, Rhode Island, from the action of the Income Tax Unit in including in taxable net income for each of the years 1917 and 1918 Federal taxes payable by the lessee of its road, in adjusting invested capital for the year 1918 according to the method prescribed in A. R. M. 188 and in excluding from invested capital for 1917 Federal taxes payable by the lessee for the year 1916.
>
> "Oral hearing has been accorded the appellant's representatives.
>
> "The first two questions here presented were previously submitted to the Committee by the Unit with a request for advice as to whether or not the lessor corporation should include in its net income Federal income and profits taxes payable by the lessee corporation and, if so, as to the correct method to be followed in computing such taxes. The Committee, at that time, thoroughly considered both questions and in A. R. M. 188 advised the Unit that such taxes were additional income to the lessor, and prescribed the method to be followed in computing such taxes as follows:
>
> > "'The lessor corporation at the close of its taxable year should, without taking into account the amount of income and profits taxes paid in its behalf by the lessee corporation, determine what its gross income and net income are, then compute the amount of income and profits taxes properly assessable against a similar amount of income, accrue upon its books additional gross income in an amount equal to the taxes so computed and include such an amount in its return as additional gross income. The amount of income and profits taxes assessable against the lessor corporation is to be

computed on the amount of net income shown in that return.'

"The Committee realizes that *the method above prescribed results in certain inconsistencies when it comes to adjusting invested capital for a succeeding year, in that surplus is necessarily increased by an amount less than the amount of the tax which is used to reduce invested capital from the date payable to the close of the taxable year.* These inconsistencies are, however, more apparent than real because, *while invested capital is reduced in a greater amount on account of the larger tax prorated, still the income for the preceding year is reduced on account of the lesser tax added to income for that year.* Further than this, *the Committee is not aware of any method which can be laid down as applicable to all cases which will not result in inconsistencies.* The method prescribed, therefore, seems to be the simplest, soundest and the most logical; it is in accordance with the practice of the Income Tax Unit and the Committee recommends that it be adhered to.

"Relative to the third point raised on appeal, the taxpayer contends that it should be allowed to include in invested capital for 1917 the Federal income taxes payable for the year 1916, up to the time those taxes became due and payable in the year 1917. The appellant's books are kept on the accrual method of accounting and the consistent policy of the Bureau has been, when such is the case, to require that income and authorized deductions shall be computed and accounted for on the same basis. Income taxes for 1916 were allowable deductions for that year. Such being the case, these taxes should have been accrued on the books as a liability as at January 1, 1917, and surplus should have been reduced in an equal amount. (See T. D. 2433 and Law Opinion 1059.)

"It is therefore recommended, in the appeal of the *Providence & Worcester Railroad Company*, that the action of the Income Tax Unit be sustained and that the appeal be denied."

To show the Court that the Bureau has not been consistent in following A. R. R. 3181 or the policy therein stated, we can refer to the very case at bar, in which the pyramiding theory was applied. Admitting that the original determina-

tion by the Bureau was made before A. R. R. 3181, why did not counsel for the Bureau, at the trial in the District Court in November, 1927, indicate that the policy of A. R. R. 3181 might be applied, and consent to a partial judgment for the plaintiff? That counsel was an officer of the Bureau of Internal Revenue—a special attorney in the office of the General Counsel of that Bureau.

Another example is a matter of public record in the District Court for the District of Connecticut in the case of *Hartford & Connecticut Railroad Company* v. *The United States*, trial in which has been postponed by consent to abide the decision of this court in the present case. In that case the Treasury Department, by letter to the taxpayer dated November 27, 1922, proposed an additional tax for 1917 in an amount which was computed on the theory of completing the pyramid of taxes—exactly as was done in this case. That taxpayer, for whom counsel for the taxpayer in the instant case happen also to be counsel, exercised the right, conferred by Section 250 (d) of the Revenue Act of 1921, to appeal from the determination of the Railroad Section of the Income Tax Unit. That appeal was in due course assigned to the office of the then Solicitor of Internal Revenue for consideration. Counsel for the taxpayer appeared before the Solicitor's office on July 10, 1923, and argued orally against the imposition of this pyramided tax. Notwithstanding this argument, the Solicitor, by letter of July 19, 1923, three months subsequent to the issuance of A. R. R. No. 3181, advised counsel for the taxpayer in that case that the Commissioner of Internal Revenue had approved his conclusion that "the action of the Income Tax Unit in including in gross income the amount of Federal income taxes paid for the lessor by the lessee of its property should be sustained."

The entire amount of the deficiency proposed in the letter of November 27, 1922, and wholly approved by the Solicitor, was in 1924 assessed and collected, notwithstanding a lesser amount was payable under the formula of A. R. R. 3181. By letter dated April 11, 1927—four years after the alleged establishment of uniformity—the Bureau rejected the taxpayer's

claim for refund of the additional tax. This rejection *in full*, in 1927, of the claim for refund, instead of allowing it in part, was certainly not consistent with the policy now claimed by the Commissioner to have been uniformly applied since 1923.

We could cite other similar instances, but these seem sufficient to show that the Bureau practice certainly has not been consistent since 1923. And, as shown above, in the light of the *published* instructions to Bureau auditors, the inconsistency is certainly *not unauthorized*.

Presumably, the Government's effort to show consistency is for the purpose of finding a basis for an argument that the inaction of Congress, in the light of known rulings, constituted legislative sanction of those rulings. But only one of those rulings was published—and that one under a limitation that it was not binding. *Prospective* Congressional sanction may be presumed for the rule of *West End Street Railway* v. *Malley* with respect to *dividends* constituting income, but there is no basis for *retrospective* Congressional sanction with respect to the proposition that *income taxes* are income, *Shearer* v. *Anderson*, 16 Fed. (2d) 995.

CONCLUSION.

For all the reasons given in our principal brief it is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the negative.

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April, 1929.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 129

UNITED STATES OF AMERICA

v.

BOSTON & MAINE RAILROAD

No. 130

OLD COLONY TRUST COMPANY ET AL., EXECUTORS

v.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AND THE COMMISSIONER OF INTERNAL REVENUE

OPINIONS BELOW

The opinion of the District Court in No. 129 is reported in 23 F. (2d) 343.

The opinion of the Board of Tax Appeals, which is the only previous opinion in case No. 130, is found in 7 B. T. A. 648.

JURISDICTION

These cases are here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In No. 129 the Fitchburg Railroad Company leased its property to the Boston & Maine Railroad Company, which, pursuant to the terms of the lease, paid the taxes assessed upon the Fitchburg Company's income.

In No. 130 the American Woolen Company, pursuant to a resolution of its Board of Directors made in advance, paid the income taxes assessed upon the salary of its President, William M. Wood. The question is, did the taxes thus paid constitute additional taxable income of the lessor and of the employee, respectively? The question was certified by the court in the following form:

> Did the payment by the lessee in No. 2235 (129) or by the employer in No. 2218 (130) of the income taxes assessable against the lessor in the first case and the employee in the second constitute additional taxable income to such lessor or to such employee?

STATUTES INVOLVED

The Revenue Act of 1917, c. 63, 40 Stat. 300, 333, Section 1206, amends Section 10 of the Revenue Act of 1916, c. 463, 39 Stat. 756, 764, to read:

> SEC. 10. (a) That there shall be levied, assessed, collected, and paid annually upon

the total net income received in the preceding calendar year from all sources by every corporation, * * * a tax of two per centum upon such income; * * *.

The Revenue Act of 1917 also made the following provisions:

SEC. 4. That in addition to the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation, * * *.

SEC. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:

* * * * *

Section 213 (a), Revenue Act of 1918, c. 18, 40 Stat. 1057, 1065, provides as follows:

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States,

> the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Section 214 (a) (3), Revenue Act of 1918, provides as follows:

> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (3) Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes; * * *.

STATEMENT OF FACTS

The facts in No. 129 as certified by the Circuit Court of Appeals (R. 1–2) are as follows:

> This action is brought by the Boston & Maine Railroad to recover income taxes for the year 1917, claimed to have been erroneously collected. In the District Court

the plaintiff recovered a judgment for the full amount of its demand—$3,920.55 and interest.

June 30, 1900, the Fitchburg Railroad Company leased all its railroad and property of every description to the Boston & Maine Railroad for the term of ninety-nine years. In the lease the lessee covenanted to pay specified rentals, to maintain and replace the leased properties in manner indicated, to pay all operating expenses, and to pay "all taxes of every description, Federal, State, and municipal, upon the lessor's property, business, indebtedness, income, franchises, or capital stock, or said rental," and to pay divers other charges. In 1918 an income-tax return, under the provisions of the revenue acts of 1916 and 1917, was filed on behalf of the Fitchburg Railroad Company for the calendar year 1917, upon which taxes amounting to $61,422.06 were assessed. These taxes were paid to the Commissioner of Internal Revenue by the Boston & Maine Railroad pursuant to the term of the lease. The Fitchburg Railroad Company was consolidated with the Boston & Maine Railroad in 1919.

In 1921 the Commissioner of Internal Revenue assessed an additional income tax against the Fitchburg Railroad Company of $3,920.55. In doing this he treated the payment of $61,422.06 made by the Boston & Maine Railroad to the collector of internal revenue as additional taxable income to the

Fitchburg Railroad Company to the extent of $65,342.61. This additional tax of $3,920.55 was paid to the collector of internal revenue by the Boston & Maine Railroad in July, 1921.

The claim for refund of this additional tax was duly filed with the Commissioner of Internal Revenue, but was never formally acted upon, and more than six months having elapsed after it was filed, this action was brought for the recovery of the tax so paid.

The certificate (p. 2–3) sets forth the facts in No. 130 as follows:

This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. The Board of Tax Appeals found a deficiency in the Federal income tax of Mr. Wood for the year 1919 of $708,781.93 and for the year 1920 of $350,837.14. The petition for review was duly filed pursuant to sections 1001 and 1002 of the revenue act of 1926 and rule 38 of this court.

William M. Wood was president of American Woolen Company during the years of 1918, 1919, and 1920. In 1918 he received as salary and commissions from the company $978,725, which he included in his Federal income tax return for 1918. In 1919 he received as salary and commissions from the company $548,132.87, which he included in his Federal income tax return for 1919.

August 3, 1916, the American Woolen Company duly adopted the following resolution, which was in effect in 1919 and 1920:

"Voted: That this company pay any and all income taxes, State and Federal, that may hereafter become due and payable upon the salaries of all the officers of the company, including the president, William M. Wood; the comptroller, Parry C. Wiggin; the auditor, George R. Lawton; and the following members of the staff, to wit: Frank H. Carpenter, Edwin L. Heath, Samuel R. Haines, and William M. Lasbury, to the end that said persons and officers shall receive their salaries or other compensation in full without deduction on account of income taxes, State or Federal, which taxes are to be paid out of the treasury of this corporation."

This resolution was amended on March 25, 1918, as follows:

"Voted: That, referring to the vote passed by this board on August 3, 1916, in reference to income taxes, State and Federal, payable upon the salaries or compensation of the officers and certain employees of this company, the method of computing said taxes shall be as follows, viz:

"The difference between what the total amount of his tax would be, including his income from all sources, and the amount of his tax when computed upon his income excluding such compensation or salaries paid by this company."

Pursuant to these resolutions the American Woolen Company paid to the collector

of internal revenue Mr. Wood's Federal income and surtaxes due to salary and commissions paid him by the company as follows:

Taxes for 1918 paid in 1919	$681,169.88
Taxes for 1919 paid in 1920	351,179.27

The decision of the Board of Tax Appeals here sought to be reviewed was that the income taxes of $681,169.88 and $351,179.27 paid by the American Woolen Company for Mr. Wood were additional income to him for the years 1919 and 1920.

SUMMARY OF ARGUMENT

In No. 129 the payment of the tax by the lessee constituted a gain to the lessor produced by the leasing of its property, and was rent. In No. 130 the payment of the tax by the employer was in consideration of services rendered by the employee and was a gain derived by the employee from his labor. The form of the payment can make no difference and it is therefore immaterial that the taxes were directly paid over to the Government. The discharge of his obligation to a third person is equivalent to receipt by the taxable. This principle of constructive receipt is recognized in a line of consistent decisions by both Federal and State courts.

These cases are here upon a certificate which presents no basis for the contention that the theory of the Government will lead to an absurdity. No attempt has been made in these cases to press the theory to an absurd result. Properly speaking, the statute imposes no tax upon a tax. The diffi-

culty arises from the fact that the parties have made the tax a measure of income.

It is not necessary to resort to a complicated mathematical formula to compute the taxes in these cases, but, in any event, it has been repeatedly held that the science of mathematics is a proper subject for judicial notice and may be employed where necessary.

Unless the contention of the United States is approved, the way will be open for evasion of taxes.

ARGUMENT

I

THE PAYMENT OF TAXES BY THE LESSEE IN THE ONE CASE ON BEHALF OF THE LESSOR AND BY THE EMPLOYER IN THE OTHER CASE ON BEHALF OF THE EMPLOYEE RESULTS IN TAXABLE INCOME TO SUCH LESSOR AND EMPLOYEE

These cases involve an application of the principle of constructive receipt of income. The certificate shows that the taxes were *imposed* upon the lessor in the first case and upon the employee in the second case. It shows further that the taxes were actually *paid* by the lessee in the first case and by the employer in the second case. As further shown by the certificate, in the first case the lessee was under a duty to make the payment by reason of the terms of the lease, and in the second case the employee entered upon his duties in the years in question under the express agreement that his income taxes would be paid by his employer. This agreement is evidenced by the terms of the resolution

passed August 3, 1916, more than one year prior to the year in which the taxes were imposed (1918, 1919). Therefore, in the first case the taxes were paid by the lessee under the lease as part of the consideration for the use of the lessor's property; that is, as part of the rent reserved in the lease. In the second case the taxes were paid by agreement and upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. Under such circumstances the payments constitute income to the lessor and employee, respectively.

There can be no doubt that if the lessee in No. 129 had paid to the lessor the amount which the latter was called upon to pay as taxes the money would be income in the hands of the lessor as a gain derived from the use of its property. *Hamilton* v. *Kentucky & I. Terminal R. Co.*, 289 Fed. 20. While to avoid circuity the money was paid directly to the Government by the lessee, that fact does not make it any the less income to the lessor. It can make no difference what form the payment takes, because it is clear that in substance and spirit the payment was in truth and reality a gain produced by the leasing of the property of the lessor. In No. 130 it is equally clear that the payment of the taxes was in consideration of the services rendered. Thus it was part of the compensation received, a gain derived from the labor of the employee. The District Court held in No. 129 that the lessor was not enriched by the payment and for that reason it

was not income. The same argument would apply if the tax money had been directly paid over to the lessor, but it must be apparent that the test is not whether the lessor might keep the money as actual profit. The true test is whether it is a gain produced by capital or labor. Because it is immediately spent for a designated purpose is of no significance in determining whether it is income. The circumstances under which it is received are the guide rather than the disposition thereafter made of it.

If these tax payments be income to the taxables—if the payment in No. 129 be a gain derived from the use of property and if the payment in No. 130 be a gain derived from the labor of the employee—it is of no consequence whether the payments were made directly to the taxables or to a third person to discharge a debt of the taxables. This is fundamental. The words of the statute also seem to support it. Section 213 of the Revenue Act of 1918 provides that the term gross income shall include *inter alia* income "of whatever kind and *in whatever form paid.*" As stated above, the taxes in No. 129 were paid by the lessee in consideration of the use of the lessor's property and in discharge of the lessor's tax obligation, while in No. 130 the taxes were paid by the employer in consideration of services rendered by the employee and in discharge of the employee's tax obligation. In each case this was equivalent to a receipt by the taxpayer. This principle has been recognized by the Board of Tax

Appeals in *Appeal of Providence & Worcester R. R. Co.*, 5 B. T. A. 1186, and *Houston Belt & Terminal Ry. Co.* v. *Commissioner*, 6 B. T. A. 1364.

The Board of Tax Appeals has not been alone in applying this principle. In *West End Street Ry. Co.* v. *Malley* (C. C. A. 1st), 246 Fed. 625, it was held that where a street railway company leased all its property to another operating company and the lessee agreed to pay as rental for the property the dividends on outstanding stock of the lessor, such payments were income to the lessor and subject to be taxed as income despite the fact that payments were made to the lessor's stockholders. This Court denied a writ of certiorari, 246 U. S. 671.

Under similar circumstances the Circuit Court of Appeals for the Second Circuit held that where the rental reserved in a lease was paid by the lessee directly to the stockholders of the lessor, the payments constituted income to the lessor. *Rennselaer & S. R. Co.* v. *Irwin*, 249 Fed. 726; certiorari denied, 246 U. S. 671. That court was clearly of the opinion that the arrangement between the parties for payment to a third person would not affect the essential character of the transaction and prevent the payment from being income to the lessor. This is evident from the following portion of the opinion (p. 727):

> It is true that the rent of its road does not go into the plaintiff's treasury and that it has no means of withholding the tax from it. It is also true that the rent reserved by the lease is paid by the lessee in fixed sums to

> third parties. All the same, the rent is the property of the plaintiff, and remains such, though by the terms of the lease paid out to others, whose rights are derived through it. While the rent is a debt of the lessee to the lessor, it is, as between the lessor and its stockholders, the lessor's income, out of which the dividends, if any, are to be paid.

In *Northern R. Co. of New Jersey* v. *Lowe* (C. C. A. 2d), 250 Fed. 856, the same conclusion was reached.

The principle is again illustrated in *Houston Belt & Terminal Ry. Co.* v. *United States* (C. C. A. 5th), 250 Fed. 1, where it was held that the payment of interest upon a mortgage debt upon property of the terminal company by four railroad companies which owned its stock was income to the terminal company. It was so held even though the railroad companies were liable for the interest and paid it directly to the mortgagee.

In *Blalock* v. *Georgia Ry. & Electric Co.* (C. C. A. 5th), 246 Fed. 387, it was held that rent under a lease which by agreement was paid directly to the lessor's stockholders was income to the lessor. In the opinion the court said (pp. 389, 390):

> * * * Is net rent paid for the use of corporate property made any the less corporate income received by the corporation, within the meaning of the provision just quoted, by the circumstances that, pursuant to a provision of the corporation's lease under which the rent is payable, it is paid to

> the corporation's then registered stockholders in amounts proportionate to their respective holdings of stock, instead of in a lump sum to the corporation itself? We think not. * * *
>
> * * * A creditor as truly receives payment of what is due him when, pursuant to his direction, the debtor makes payment to another, as he does when payment is made directly to himself.

Further support for this contention is found in *American Telegraph & Cable Co.* v. *United States,* 61 C. Cls. 326. In that case it was held that where one of the stockholders of a corporation guarantees certain dividends to the other stockholders by endorsement on their certificates and pays to certain stockholders their respective proportion of an agreed annual rental, which is secured by said guarantee of dividends, the rental so paid is income of the corporation and taxable as such. This Court denied certiorari, 271 U. S. 660.

This principle was held to be well established in *United States* v. *Western Union Telegraph Co.* (S. D. N. Y.), 19 F. (2d) 157, where a lessee had agreed to pay certain specific sums annually to the individual stockholders for the use and occupancy of the lessor's property. The court there said (p. 158):

> It is too well established to be questioned that all the payments made and to be made by the Western Union Telegraph Company to the stockholders of the Northwestern

Telegraph Company under the foregoing agreements must be held to constitute taxable income of the Northwestern Telegraph Company. *Rensselaer & S. R. Co.* v. *Irwin* (C. A. C.) 249 F. 726, certiorari denied 246 U. S. 671, 38 S. Ct. 424, 62 L. Ed. 931; *Northern R. Co. of New Jersey* v. *Lowe* (C. C. A.) 250 F. 856. See also, *Houston Belt & Terminal Ry. Co.* v. *United States* (C. C. A.) 250 F. 1; *Hamilton* v. *Kentucky & I. Terminal Ry. Co.* (C. C. A.) 289 F. 20; *American Telegraph & Cable Co.* v. *United States,* 61 Ct. Cls. 326, certiorari denied April, 1926, 271 U. S. 660, 46 S. Ct. 473, 70 L. Ed. 1137; *West End Street Ry. Co.* v. *Malley* (C. C. A.) 246 F. 625, certiorari denied 246 U. S. 671, 38 S. Ct. 423, 62 L. Ed. 931.

That the principle is also recognized in the State courts is evident from the case of *Estate of Levalley,* 191 Wis. 356. In that case a testator had provided for the payment of estate taxes out of his estate and it was held that the right of the legatee to receive his legacy free from tax gave him an interest in the estate over, above, and beyond the legacy actually received and constituted a transfer of an additional interest in the estate.

To the same effect was the holding in *Estate of Irwin,* 196 Cal. 366, where, under similar circumstances, it was held that the legatee was bequeathed an additional amount sufficient to pay the tax.

Upon the authority of these consistent decisions of both Federal and State courts, we think it is now

settled that the difference between payment of rent to the lessor and payment of the rent direct to a third party for the benefit of the lessor is one of method and not of substance. Taxation is a practical matter, and the Revenue Acts were designed to operate in a practical world. It is clear that, looking through the form and having due regard for the substance, the taxes in these cases, though paid directly to the collector, were nevertheless gain derived by the taxables. We therefore submit that the payment by the lessee in No. 129 and by the employer in No. 130 of the income taxes assessed against the lessor in the first case and the employee in the second case constitutes taxable income to such lessor and to such employee.

Duffy v. *Pitney,* 2 F. (2d) 230, is not inconsistent in principle with the cases cited above. That case involved tax-free covenant bonds and held that the payment by the debtor corporation of the 2% tax upon bond interest was not income to the bondholder.

However, the tax was withheld at the source in obedience to the statute and the corporation in paying the tax was discharging a duty cast upon it by the statute. The corporation was not permitted to deduct it in ascertaining its own net income. In effect it was paying its own tax. Furthermore, the case was decided after the enactment of the Revenue Act of 1921, c. 136, 42 Stat. 227, 254, which declared in Section 234(a) (3) "nor shall such tax be in-

cluded in the gross income of the obligee." This action by Congress was referred to in the decision then under review (291 Fed. 621, 625) as "indicative of its desire to make it clear that it was not taxing citizens upon a fiction but upon their income." In the instant cases it is clear that the taxes were imposed upon the lessor and the employee and that the statute cast no duty upon either the lessee or the employer. Accordingly, it is apparent that *Duffy* v. *Pitney, supra,* distinguishes itself and presents no conflict with the cases upon which we rely.

Nor does the case of *Matter of Estate of Swift,* 137 N. Y. 77, establish that the principle for which we contend is not recognized in New York. In that case the question was whether the collateral inheritance tax law of New York was enforcible as to property which at the time of the death of the testator was outside the territorial limits of the state. The following language of the opinion clearly distinguishes that case (pp. 82–83):

> * * * Could anyone say, after reading the provisions of this law, that it was the legatee, or person entitled, who was taxed? I doubt it. Property, which was the decedent's at the time of his death, is subjected to the payment of a tax. The tax is to be deducted from the legacy; or, when deduction is not possible from the legacy not being in money, and a collection from the legatee or the person entitled to the property is author-

> ized to be made, the tax so to be collected is described as *"the tax thereon,"* that is, on the property.
>
> If it should be said that such an interpretation of the law is in conflict with the doctrine which some judges have asserted, respecting the nature of this tax, I think it might be sufficient to say that the phraseology of the New York law differs, more or less, from that of other states, and seems peculiarly to charge the subject of the succession with the payment of the tax. But I do not think it at all important to our decision here that we should hold it to be a tax upon property precisely.

The court was clearly of opinion that the tax was not a charge upon the legatee. Naturally, under that view, the tax could not enlarge his bequest, so that the case is not helpful in determining whether the payment of a person's tax by another constitutes income to the taxable.

Nor can it be argued that the payment of the tax in No. 130 was a gift. That payment for services, even though in the form a gratuity, is compensation within the statute is illustrated by the case of *Noel* v. *Parrott* (C. C. A. 4th), 15 F. (2d) 669. In that case, the directors of a corporation, in contemplation of the sale of all the stock and assets of the company, and the consequent resignation of its officers, and in view of the long and faithful services of its officers as well as their services in the sale of assets, passed the following resolution (p. 669):

> Resolved, that a gratuitous appropriation equal in amount to $3 per share on the outstanding stock of the company be set aside out of the assets *for distribution to certain officers and employees* of the company and that the executive committee be authorized to make such distribution as they deem *wise and proper.*

The executive committee directed that $35,000 be paid to the plaintiff taxpayer. The court said, at page 672:

> *In no view of the evidence, therefore, can the $35,000 be regarded as a gift. It was either compensation for services rendered,* or a gain or profit derived from the sale of the stock of the corporation, or both; *and, in any view, it was taxable as income.* (Italics supplied.)

In view of the foregoing, we submit that the question presented by the certificate should be answered in the affirmative.

II

THERE IS NO MERIT TO THE TAXPAYERS' CONTENTION THAT THE THEORY OF THE GOVERNMENT WILL LEAD TO AN ABSURDITY

The taxpayers contend that if these payments by the lessee and employer constitute income to the lessor and the employee, the lessee and employer will be called upon to pay the tax imposed upon this additional income and that the payment of the additional tax will create further income which will

in turn be subject to tax, with the result that there would be a tax upon a tax. They urge that the Government's theory, when carried to its logical conclusion, results in an absurdity which Congress could not have contemplated.

There are two reasons why this argument can not prevail. In the first place, no attempt has been made by the Treasury to collect further taxes, upon the theory that the payment of the additional taxes creates further income, and the question of a tax upon a tax was not before the Circuit Court of Appeals and has not been certified to this Court.[1] It will be time enough to complain of compounding taxes when an attempt to do so is made. See *United States* v. *Sullivan*, 274 U. S. 259. This Court is now dealing only with the cases in hand, and whether absurd results will follow in imaginary cases is not a matter for present consideration. As stated in *Yazoo & Mississippi R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219:

> * * * this court must deal with the case in hand and not with imaginary ones. It

[1] The certificate shows (p. 2) that the payment of the lessor's initial tax of $61,422.06 was held by the Commissioner to constitute additional income upon which a tax of $3,920.55 was paid, and for the recovery of which the action in No. 129 was commenced.

With respect to No. 130, the certificate shows (p. 2–3) that the employee's executors took an appeal from the Commissioner's determination that the initial taxes paid by the employer constituted additional income to the employee.

> suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now.

We assume that the contention will be made here, as in the court below, that the Treasury would have no right to stop with one computation as it did in these cases and fail to assess further taxes *ad infinitum* upon the theory that each payment of tax created further income. This contention, which amounts to a complaint by the taxpayer that he has been taxed too little, has, at least, the merit of novelty. However, we think that in a case where the parties have placed themselves in such a position that extreme hardship will follow the literal application of a principle, the Treasury Department is not fairly to be censured if it fails to apply its theory literally in order to avoid absurd consequences. The limited application which has been given to the theory in these cases leads to no absurdity and the question now before this Court is circumscribed by the general rule that it is sufficient if a statute is valid as applied to the case in hand. The question of where to draw the line is one which need not trouble the Court. *Irwin* v. *Gavit*, 268 U. S. 161, 168.

In the second place we contend that, properly speaking, there can be no question of a tax upon a tax being imposed by Congress. If the payment of the tax creates income, then any further tax would be imposed upon such income solely because it was income and the fact that the money treated as income was in reality used to pay taxes does not result in levying a tax upon a tax. In enacting the Revenue Acts Congress merely imposed these taxes upon income. It had nothing to do with the resolution of the Board of Directors of the American Woolen Company or with the lease entered into by the Fitchburg Railroad Company and the Boston & Maine Railroad. The difficulty arises from the agreement of the parties, not from the law. The United States does not care who ultimately bears the weight of the tax, but if through arrangement between the parties the payment of the tax results in further income, it is a result which flows from the acts of the parties and not from the imposition of the initial tax. The parties, of course, were under the practical difficulty of not being able to calculate the amount of tax for each year of the agreement and for that reason provision for paying the taxes was made by the blanket clause in the lease and in the resolution. However, if in lieu of that general provision the lease had provided for payment of $61,422.06 to cover the tax of the Fitchburg R. R. Co. for the year involved and if the resolution had provided for the payment of the exact amount of

the tax of Mr. Wood, and further if the Fitchburg R. R. Co. and Mr. Wood had included such payments in their original returns for the years involved, this question of compounding the tax would not have arisen.

> * * * It could not well be doubted that, had they been beforehand fixed in amount, they would properly be treated as income. That these amounts were uncertain until fixed by experience does not alter their essential nature. [*Hamilton* v. *Kentucky & I. Terminal R. Co.*, 289 Fed. 20, 23.]

It is therefore submitted that the statute does not impose any tax upon a tax, but that the whole question is injected into these cases solely by reason of the acts of the parties themselves. They have made the tax a measure of income and Congress has made income the measure of the tax.

A similar argument was made to the Wisconsin court in the case of *Estate of Levalley,* 191 Wis. 356, 359, and was disposed of by the court in the following language:

> * * * it is argued that if the statute be so construed it results in a payment of a tax upon a tax. This is not strictly true. While it is true in the supposed case that $7,879 goes to the state and not to the legatee, it is equally true that a tax is reckoned upon the whole amount of a legacy, including that part of it necessary to pay the tax when the tax is not payable from the residue and is deducted

from the legacy. There is no more a tax upon a tax in the one case than in the other.

This would seem to dispose of the contention that the Government's theory results in an absurdity.

III

IT IS NOT NECESSARY TO RESORT TO A COMPLICATED MATHEMATICAL FORMULA TO COMPUTE THE TAXES IN THESE CASES. NEITHER DOES EDWARDS *v.* SLOCUM CONDEMN THE USE OF SUCH FORMULÆ WHEN NECESSARY

It is further objected that the computation of the tax presents a difficulty which can only be solved by resort to an algebraic formula, and much reliance has been placed upon the expression of this Court in *Edwards* v. *Slocum,* 264 U. S. 61, 63:

> * * * It fairly might be answered, as said by the Circuit Court of Appeals, that "algebraic formulæ are not lightly to be imputed to legislators," but it appears to us that the structure of the statute is sufficient to exclude the imputation.

If the payments of the lessor's and employee's taxes by the lessee and employer, respectively, be income, we submit that if necessary the Treasury Department has an undoubted right to make use of whatever branch of mathematical science is applicable for the determination of the tax upon it. This Court did not say in the *Slocum case, supra,* that where income can only be correctly calculated and clearly reflected by algebraic formulæ, that such formulæ are nevertheless conclusively presumed to

be beyond the ken of Congress. *Humes* v. *United States,* 276 U. S. 487, rather indicates that the true test is whether there are known data upon which to base some standard, recognized method of calculation. The Government is not to be deprived of its tax because the parties have made the tax a measure of income. No court has ever denied the resort to mathematics wherever it becomes necessary. On the contrary, it has been many times held by the courts that the science of mathematics is a proper subject for judicial notice and calculations based on various branches of this science have been frequently employed and their use judicially justified. See *Wyldes* v. *Patterson,* 31 N. D. 282; *Scanlan* v. *San Francisco & S. J. V. Ry. Co.,* 55 Pac. 694.

The use of mortality tables is well recognized and this Court has evidenced its approval of their employment. See *Simpson* v. *United States,* 252 U. S. 547, 550.

See also *Cochran* v. *United States,* 254 U. S. 387, 390; *Appeal* of *Providence & Worcester R. R. Co.,* 5 B. T. A. 1186; *Boston & Maine R. R.* v. *United States,* 23 F. (2d) 343; and *Wood, Administrator,* v. *Chapman,* 87 Okla. 49.

We think the cases sufficiently establish our contention that if the occasion demands it resort may be had to any approved method of calculation. In our view, however, this tax can be computed in a more simple manner than suggested by the taxpayers. The following example is calculated

only with reference to the normal tax, eliminating any excess-profits tax calculations. Let us suppose that the agreed amount of rent to be paid over each year was $94,000. The tax rate for 1917, the year involved in the case at bar, was 6%. The total taxable income of the lessor would therefore be not $94,000 but $94,000, plus a sufficient amount of money to pay an income tax at 6% on a total taxable income which would net the lessor $94,000. No involved algebraic formulae are necessary to solve this problem.

If 100% represents the total net taxable income of the lessor, and the tax rate is 6%, then 94% must represent the net amount of cash turned over to the lessor by the lessee. That is to say:

100% = Total net taxable income,
6% = Tax rate,

94% = $94,000, net amount of cash turned over by lessee to lessor.

Therefore:

$94,000 ÷ 94% = $100,000—Total net taxable income,
6% = 6,000—Tax liability of lessor.

However, the lessee, in arriving at the amount that it should withhold from the total taxable income to pay the tax on behalf of the lessor, did not first determine the total rent due from it to the lessor; but, determined lessor's tax liability by multiplying the net amount turned over to the lessor, or $94,000, by 6%, as follows:

$94,000 × .06 = $5,640.

The lessee thus determined the lessor's tax liability to be $5,640 instead of $6,000, the true amount. This error in the principle of the calculation brought into play a more complex computation. The $5,640 being additional income over and above the said $94,000, the lessor was liable to an income tax thereon, the amount of which the lessee was obligated to pay to the lessor or nominee as a part of the consideration for the lease. So that we find the lessee's method of determining the rent due from it to the lessor leading to the following:

$94,000.00×.06=	$5,640.00
5,640.00×.06=	338.40
338.40×.06=	20.30
20.30×.06=	1.22
1.22×.06=	.08
.08×.06=	.00
$100,000.00	$6,000.00

The greater simplicity of the previous calculation is obvious and it is equally applicable to the employee in No. 130. If we are correct that the taxes paid for them should be included in their income, then it becomes clear that these taxpayers have built their whole pyramid upon the wrong foundation.

IV

EVASION OF INCOME TAX OBLIGATIONS WOULD RESULT IF PAYMENT OF TAX BY THIRD PERSONS WERE NOT TAXED AS INCOME TO PERSON FOR WHOM PAID

Finally, we wish to point out that if a corporation can pay the income tax of its employees without

the amount of the tax being included as income to the employee, it will result in evasion of taxes. While we do not suggest any such intention in the instant cases, it is clear that unless the contention of the Government is approved, the door will be open for evasion. It would be a simple matter in all cases for an employer and employee to agree upon a salary, calculate the amount of tax thereon, reduce the amount of the salary by the amount of the calculated tax, and then have the employer pay the tax upon the reduced basis. The Government would lose the difference between the tax on the full salary and the tax on the reduced salary. An adjustment of the gain between employer and employee could be made with advantage to both, but it is clear that it would be at the expense of the Government. The practical result would be to permit the employee to deduct the amount of his tax from his salary in computing his net income, which is contrary to the provisions of the Act. (Revenue Act of 1918, Section 214 (a) (3).)

In *Estate of Irwin, supra,* the California court perceived a similar opportunity. At page 376 the court said:

> * * * It is at once apparent that upon appellants' theory that the tax is to be computed only upon the bequest as specified in actual figures in the will and upon the residuum after the deduction of the payment of the tax upon the bequest of $100,000, that no tax would be computed upon the money

left by the testatrix to be applied to the payment of the inheritance tax upon the various bequests. By this means a testator by a direction to pay all inheritance taxes out of the residue could defeat the payment to the state of the tax on a very substantial part of his estate.

This reasoning applies with equal force to the situation presented by these cases.

CONCLUSION

It is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the affirmative.

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DECEMBER, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 130

OLD COLONY TRUST COMPANY ET AL., EXECUTORS

v.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL BRIEF FOR THE COMMISSIONER OF INTERNAL REVENUE

This case is here on certificate from the United States Circuit Court of Appeals for the First Circuit. Two cases involving similar questions on the merits were consolidated in one certificate. The certificate shows that in one case the action was brought by the Boston and Maine Railroad in the United States District Court to recover income taxes alleged to have been erroneously collected. The other case (R. 2) reached the Circuit Court of Appeals by a petition to review the decision of the United States Board of Tax Appeals.

During the argument on the merits, this Court raised the question as to its own jurisdiction in that

case which reached the Circuit Court of Appeals by appeal from the United States Board of Tax Appeals, and suggested that briefs be filed on the following

QUESTION

Does an appeal from the Board of Tax Appeals to a United States Circuit Court of Appeals under the Revenue Act of 1926 present in that court a judicial case or controversy within the judicial power of the United States as defined in Section 2 of Article III of the Constitution so as to be within the jurisdiction of a United States Circuit Court of Appeals, and which may be considered by this Court on certificate from the United States Circuit Court of Appeals?

ARGUMENT

THE RECORD IN THIS CASE IS NOT COMPLETE ENOUGH TO JUSTIFY CONSIDERATION OF THE QUESTION AND THE COURT SHOULD DISMISS THE CERTIFICATE IN SO FAR AS IT DEALS WITH THE BOARD OF TAX APPEALS CASE, OR ORDER UP THE ENTIRE RECORD IN THAT CASE

For the purpose of considering the above question, the record is insufficient because it fails to disclose whether the appeal to the Board of Tax Appeals was taken before or after the enactment of the Revenue Act of 1926. It seems probable that there is a substantial difference between cases reaching the Circuit Court of Appeals where the appeal to the Board of Tax Appeals was taken before the passage of the 1926 Act and those cases in

which the appeal to the Board of Tax Appeals was taken after the passage of that Act. The pertinent provisions of the Revenue Acts of 1924 and 1926 are set forth in Appendix A to this brief.

In determining whether these cases as they reach the United States Circuit Court of Appeals are there cases or controversies, an important consideration is whether the judgment of the Circuit Court of Appeals has finality and becomes a final and indisputable basis of further administrative action determining the rights of the parties, or whether its judgment is without finality and the same matter may be afterwards litigated by the taxpayer in a suit against the United States to obtain a refund.

The Board of Tax Appeals was created by the Revenue Act of 1924. It was given jurisdiction to hear appeals by taxpayers from decisions of the Commissioner of Internal Revenue determining that there was a deficiency in the amount of tax which had been paid. There was no provision for any appeal to the United States Circuit Courts of Appeals or to the Court of Appeals of the District of Columbia. Section 274 (b) provided that if the Board determined there was a deficiency the amount so determined should be assessed and paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner, but disallowed as a deficiency by the Board, could be assessed, but the Commissioner was left at liberty, notwithstanding the decision of the

Board against him, to bring a suit in court against the taxpayer to collect the alleged deficiency. On the other hand, by Section 900 (g), it was provided that the taxpayer, after paying the tax determined by the Board to be due, could bring a suit against the United States for its recovery, and in such suit, brought by the Commissioner or by the taxpayer, the findings of the Board were prima facie evidence of the facts.

By the Revenue Act of 1926 this procedure was changed, and a direct appellate review of the Board's decision was substituted.

Section 1001 (a) of the Revenue Act of 1926 provides that any decision of the Board rendered after the enactment of that statute may be reviewed by a Circuit Court of Appeals or the Court of Appeals of the District "if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered."

If the taxpayer is an inhabitant of any Circuit, the case goes to the court of that Circuit, unless by agreement between the Commissioner and the taxpayer it is taken to the Court of Appeals of the District.

Section 1003 (a) of the 1926 Act provides that the judgments of the Circuit Courts of Appeals and the Court of Appeals of the District on appeal from the Board of Tax Appeals shall be final, subject only to review by this Court on certificate or certiorari.

Section 1005 (a) makes it clear that the decisions of the courts on such appeals become a final and indisputable basis for adjusting the taxpayer's liability.

We now come to those provisions which may make a distinction in the matter of finality of the judgments of the courts between cases where the appeal to the Board of Tax Appeals was taken prior to the passage of the 1926 Act and those cases in which the appeal to the Board was taken afterwards.

Section 284(d) of the 1926 Act provides that "if the taxpayer *after the enactment of this Act* files a petition with the Board of Tax Appeals * * * no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court," with certain exceptions not here material. The effect of this is that if an appeal be taken by the taxpayer to the Board after the passage of the 1926 Act the only judicial review permitted is by appeal to the Circuit Court of Appeals or the Court of Appeals of the District from the decision of the Board and the taxpayer is deprived of the right to relitigate the question by suit in the United States District Court or in the Court of Claims to recover the additional tax after he has paid it. This gave finality to the decisions of the courts on appeals from the Board of Tax Appeals with respect to cases where the appeal to the Board had been taken after the passage of the 1926 Act.

Section 283 (b) provides:

> *If before the enactment of this Act* any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 * * * and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and *except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of Section 284.* (Italics ours.)

The provisions of Section 284 (d), referred to, are those which denied to the taxpayer the power to bring any suit against the United States for the recovery of the tax after he had adopted the procedure of appealing to the Board of Tax Appeals and to the Circuit Court of Appeals.

These provisions are open to the construction that, in a case where the appeal to the Board of Tax Appeals has been taken after the passage of the 1926 Act the taxpayer's only right to resort to the courts is by appeal from the Board to the Circuit Court of Appeals or the Court of Appeals of the District, whose decisions have finality and

finally adjudicate his liability for deficiency, whereas if the appeal to the Board of Tax Appeals was taken before the passage of the 1926 Act the taxpayer has a right to appeal to the Circuit Court of Appeals from a decision of the Board rendered after the passage of the 1926 Act, but notwithstanding his appeal to the Circuit Court of Appeals, Section 283 (b) expressly relieves him from the operation of subdivision (d) of Section 284, which is the provision forbidding him to bring a suit against the United States to recover the tax after he has paid it. The effect of these provisions, if so construed, is to allow him to relitigate in the suit instituted in the United States District Court after he has paid the tax the very questions before the United States Circuit Court of Appeals on the appeal from the Board in those cases where the appeal to the Board was taken prior to the passage of the Act of 1926. This construction of subdivisions (b) and (f) of Section 283 finds some support in the following paragraphs appearing on page 32 of the Report of the Senate Committee on Finance on the Revenue Act of 1926 (Report No. 52, 69th Cong., 1st Session):

> Section 283 (b) covers cases pending before the Board of Tax Appeals at the time of the enactment of the bill and gives the board jurisdiction over those cases, together with the new right of appeal to the circuit court of appeals, and prevents the commissioner from taking any steps to assess or

collect the tax until the decision of the board has become final. But it should be noted that the taxpayer, despite his appeal to the board, is not barred from suit for refund. If he takes advantage of the appeal to the court it is not likely that he will bring suit for refund if the Supreme Court has decided against him on his appeal from the board.

* * * * *

Section 283 (f) relates to cases like those described in the preceding paragraph but which are pending before the board at the time of the enactment of this bill. In such cases the jurisdiction of the board is preserved and the case proceeds in exactly the same manner as in the case of an income tax in the new bill, except that the taxpayer is not barred from his right to claim a refund if the decision of the board is against him.

The statute was so construed in *Emery* v. *United States,* 27 F. (2d) 992, and *Old Colony R. Co.* v. *United States,* 27 F. (2d) 994.

We understand that a committee of the American Bar Association collaborated with the Bureau of Internal Revenue in suggesting to Congress the adoption of those parts of the Revenue Act of 1926 providing for appeals from the Board of Tax Appeals to the United States Circuit Courts of Appeal, and that a committee of the Bar Association has been granted leave to file a brief *amicus curiae,* in which it will take the position that in those cases where the appeal to the Board was taken before the 1926 Act was passed and an appeal is taken by

the taxpayer to the United States Circuit Court of Appeals the judgment of the latter court has finality and it is not open to the taxpayer after he pays the tax, in obedience to the judgment, to thereafter bring suit and relitigate the question in an attempt to obtain a refund. We welcome their brief and hope that they are right, and that they will be able to explain away the last clause in Section 283 (b).

In respect of appeals to the Board taken before the 1926 Act was passed, the statute may mean that the Board's decision alone has no finality and does not prevent a suit for refund, but if the taxpayer appeals to the Circuit Court of Appeals, he is concluded by its decisions.

In any event, it seems to us that there is very substantial room for argument as to whether this difference does exist between cases appealed to the Board before and those appealed to the Board after the passage of the 1926 Act, and if this difference does exist, and there is finality to the judgment of the Circuit Court of Appeals in the one case and not in the other, that difference may become an important consideration in determining whether a case or controversy is presented, and it seems desirable for this Court to know, in dealing with this question, whether the case is one appealed to the Board before or is one appealed after the 1926 Act was passed. The Court should not have to decide two questions when, if the case were properly presented by the record, only one may be involved.

The record in the Circuit Court of Appeals shows that in the *Old Colony Trust Company case* the appeal to the Board of Tax Appeals was taken prior to the passage of the 1926 Act.

We are advised that there are now pending in the Circuit Court of Appeals 212 cases like the one at bar, in which the appeal to the Board of Tax Appeals was taken before the 1926 Act was passed, and that there are approximately 1,000 cases now pending before the Board of Tax Appeals and not yet decided by it, in which the appeals were taken to the Board before the 1926 Act was passed.

The question, therefore, as to whether a case or controversy is presented in the Circuit Court of Appeals in a case where the appeal to the Board was taken before the passage of the 1926 Act is an important one, and no doubt would ultimately reach this Court in any event.

We have confidence that in respect of cases where the appeals to the Board were taken after the 1926 Act was passed and where, by the plain provisions of the statute, judgments of the Circuit Courts of Appeals finally determine the rights of the parties and become the final and indisputable basis for satisfaction of the taxpayer's liability, a case or controversy is presented to the Circuit Court of Appeals. The opinion of the Senate Committee on Finance on these points is set forth in Appendix B hereto. If the section dealing with appeals taken to the Board of Tax Appeals before the 1926 Act was passed be construed to deprive the judgments of the

United States Circuit Court of Appeals of finality, a serious question is presented. Both questions are important and difficult, and we feel that an opportunity for oral argument should be given. Because of this, and the state of the record, we respectfully suggest that, pursuant to Section 239 of the Judicial Code, the Court require that the entire record in the *Old Colony Trust Company case* be sent up for its consideration, and that in due course this question be argued orally.

In No. 129, *United States* v. *Boston & Maine Railroad,* the certified question should be answered.

Respectfully submitted.

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JANUARY, 1929.

APPENDIX A

REVENUE ACT OF 1924, ACT OF JUNE 2, 1924, C. 234, 43 STAT. 253

SEC. 274. (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

SEC. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

(b) Each member of the Board shall be appointed by the President, by and with the advice and

consent of the Senate, solely on the grounds of fitness to perform the duties of the office. The term of office of all members who are to compose the Board during the period of two years after the enactment of this Act, shall expire at the end of such period. The terms of office of the first seven members who are thereafter to compose the Board shall expire, two at the end of the fourth year, two at the end of the sixth year, two at the end of the eighth year, and one at the end of the tenth year, after the expiration of such two-year period. The term of office of each such member shall be designated by the President, and the terms of office of their successors shall expire ten years after the expiration of their predecessors' terms, except that any individual appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor, and a member in office at the expiration of the term for which he was appointed may continue in office until his successor is qualified. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason. Each member shall receive a salary at the rate of $7,500 per annum.

* * * * *

(g) In any proceeding in court under sections 274, 279, 308, or 312, and in any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board shall be prima facie evidence of the facts therein stated.

REVENUE ACT OF 1926, ACT OF FEBRUARY 26, 1926, C. 27, 44 STAT. 9.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed

or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

SEC. 277. (b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

SEC. 279. (a) If the Commissioner believes that the assessment or collection of a deficiency will be jeojardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the Commissioner shall mail a notice under such subdivision within 60 days after the making of the assessment.

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(c) The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of subdivision (f) of section 274 and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or is subsequently filed, and the Board shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

(d) If the jeopardy assessment is made after the decision of the Board is rendered such assessment may be made only in respect of the deficiency determined by the Board in its decision.

(e) A jeopardy assessment may not be made after the decision of the Board has become final or after the taxpayer has filed a petition for review of the decision of the Board.

(f) When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in subdivision (j) of this section.

(g) If the bond is given before the taxpayer has filed his petition with the Board under subdivision (a) of section 274, the bond shall contain a further condition that if a petition is not filed within the period provided in such subdivision, then the amount the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subdivision.

(h) Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(i) When the petition has been filed with the Board and when the amount which should have been assessed has been determined by a decision of the Board which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount

determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 284. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

(j) In the case of the amount collected under subdivision (i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under subdivision (i) of this section, or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in subdivision (j) of section 274. If the amount included in the notice and demand from the collector under subdivision (i) of this section is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month (or, for any period the estate of the taxpayer is held by a fiduciary appointed by any court of competent jurisdiction or by will, at the rate of 6 per centum per annum) from the date of such notice and demand until it is paid.

(k) No claim in abatement shall be filed in respect of any assessment made after the enactment of this Act in respect of any income, war-profits, or excess-profits tax.

SEC. 282. (a) Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any tax-

payer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the provisions of subdivision (a) of section 274, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claim for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

SEC. 283. (b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the

Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

* * * * *

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

SEC. 284. (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the

Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

TITLE X.—BOARD OF TAX APPEALS

SEC. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

TITLE IX.—BOARD OF TAX APPEALS

Membership of Board

SEC. 900. The Board of Tax Appeals (hereinafter referred to as the "Board") is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; ex-

cept that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

SEC. 901. (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each member shall receive salary at the rate of $10,000 per annum.

(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth year, four at the end of the tenth year, and four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his pred-

ecessor was appointed shall be appointed only for the unexpired term of his predecessor.

* * * * *

SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.

* * * * *

SEC. 906. (f) The findings of the Board made in any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be prima facie evidence of the facts therein stated.

SEC. 907. (a) Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public and shall be stenographically reported. The Board is authorized to contract for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceed-

ings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The mailing by registered mail of any pleading, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, order, notice, or process.

(b) It shall be the duty of the Board and of each division to make findings of fact and a decision in each case before it, and report thereon in writing; except that the findings of fact and report thereon may be omitted in case of a decision dismissing any proceeding upon motion either of the taxpayer, the Commissioner, or the Board. Whenever the Board deems it advisable, the report shall contain an opinion in writing in addition to the findings of fact and decision.

(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any

division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents. * * *

SEC. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpoena ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his

direction and shall then be subscribed by the deponent.

SEC. 909. (a). Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926.

SEC. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax.

SEC. 1001. (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

* * * * *

(c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under Title II or Title III of the Revenue Act of 1924 or of this Act. If as a result of a waiver under subdivision (d) of section 274 or subdivision (d) of section 308 any part of the amount determined by the Board is

paid after the filing of the review bond such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, or, if collection has not been made, shall be abated.

SEC. 1003. (a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

SEC. 1122. (a) If any person is summoned under this Act to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

APPENDIX B

Senate Report No. 52, and House Report No. 1, 69th Congress, First Session, explain the court review of decisions of the Board of Tax Appeals in practically identical language. The following is taken from the Senate Report (pp. 36–37):

> *Court review — Questions of fact and law.*—The procedure for review of determinations of the board is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the Packers and Stockyards Act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of Section 1003 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper

interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 of the revenue act of 1924 as amended in the pending bill and subdivision (b) of section 1003 of the pending bill). The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy such as injunction, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax

in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

The principles discussed in the preceding paragraph are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, as in the importation of merchandise and the admission of aliens. In adhering to such principles the committee is of the opinion that it is establishing an appellate procedure that is unquestionably constitutional.

Jury trial need not be granted in the proposed procedure for the reason that the proceeding is not one at common law within the meaning of the provisions of the Constitution. It is of course true in addition that the taxpayer may, by paying his tax and suing the collector for a refund instead of petitioning the board, obtain a jury trial if he desires it.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 129

UNITED STATES OF AMERICA

v.

BOSTON & MAINE RAILROAD

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

This case is now before the Court upon reargument, pursuant to the Order of February 18, 1929. The Order recites that the Court especially desires assistance of counsel in respect of the following matters:

1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?

2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when considering

appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court questions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

This case originated in the United States District Court for the District of Massachusetts, and hence the first two questions are without application here. Those questions, as well as Questions 3 and 4, are fully dealt with in the brief filed in Case No. 130 (*Old Colony Trust Company et al, Executors,* v. *Commissioner of Internal Revenue*).

There can be no doubt that upon an appeal from the judgment of a United States District Court the Circuit Court of Appeals acts as a tribunal of appellate jurisdiction, and that a case is presented under Title 28, United States Code, Section 346, in which the Circuit Court of Appeals is authorized to certify any question deemed necessary for its proper decision.

The question upon the merits is whether the payment by the Boston & Maine Railroad, Lessee, pur-

suant to the terms of its lease, of the income taxes assessed against the Fitchburg Railroad Company, Lessor, constituted additional income to the Lessor.

The facts and the applicable statutes are set forth in the first brief for the United States.

Since the brief in Case No. 130 (*Old Colony Trust Company et al., Executors,* v. *Commissioner of Internal Revenue*) deals fully with Questions 3 and 4, which alone are applicable to this case, and since this Court has ordered that both cases be heard at the same time, it seems unnecessary to repeat the argument in this brief.

CONCLUSION

For the reasons appearing in the original brief for the United States, and the brief for the Commissioner of Internal Revenue on reargument in Case No. 130, it is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the affirmative.

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APRIL, 1929.

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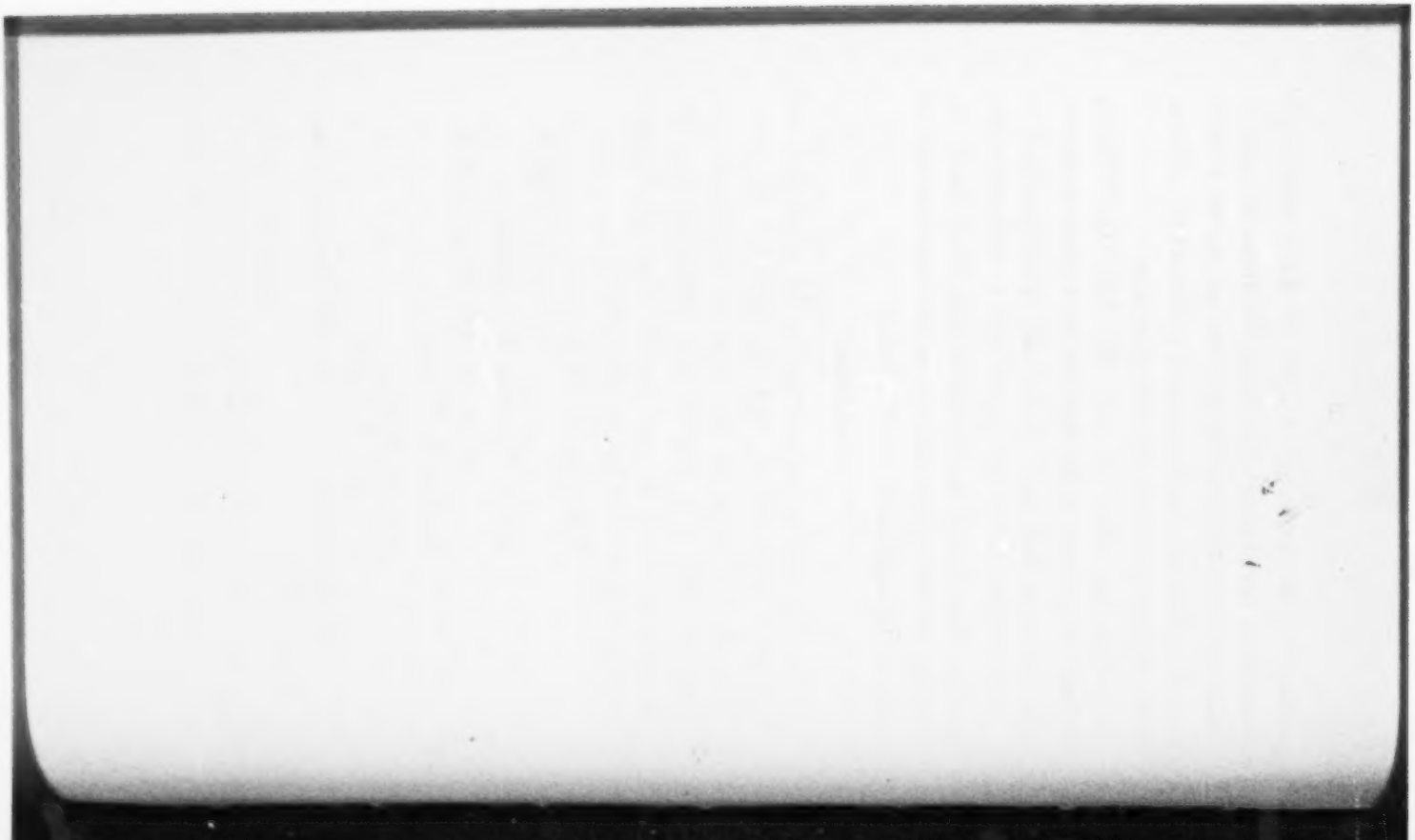

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 130

OLD COLONY TRUST COMPANY ET AL., EXECUTORS

v.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE COMMISSIONER OF INTERNAL REVENUE ON REARGUMENT

STATEMENT

This case is now before the Court upon reargument, pursuant to the order of February 18, 1929. The order recites that the Court especially desires assistance of counsel in respect to the following matters:

> 1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?
>
> 2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when

considering appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court questions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

The question upon the merits is whether the payment by the American Woolen Company, pursuant to a resolution of its Board of Directors made in advance, of the income tax assessed upon the salary of its president, William M. Wood, constitutes additional income to the employee.

In conformity with the suggestion in the aforesaid order of this Court, the Circuit Court of Appeals for the First Circuit has amended the certificate. The facts material to the question now under consideration are (R. 5–7):

> This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, the Commissioner of Internal Revenue notified Mr. Wood by registered mail

of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The amount of this deficiency was revised by the Commissioner's letter of August 18, 1925. On August 22, 1925, an appeal was taken to the Board of Tax Appeals. In response to an order to make petition more definite and certain, an amended petition was filed October 27, 1925. The hearing before the Board of Tax Appeals was held April 11, 1927, and the decision of the Board of Tax Appeals was rendered November 12, 1927. The Board of Tax Appeals approved the action of the Commissioner and found a deficiency in the Federal income tax of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review in this Court of the decision of the Board of Tax Appeals, pursuant to the Revenue Act of 1926 and Rule 38 of this Court, was perfected December 23, 1927.

The statutes involved in the merits are set forth in the first brief for the Commissioner of Internal Revenue. The statutes involved in the question of jurisdiction are set forth in Appendix A to this brief.

SUMMARY OF ARGUMENT

The United States Board of Tax Appeals exercises functions of a judicial character. In reviewing decisions of the Board of Tax Appeals the Circuit Courts of Appeals exercise judicial power. Consequently, there was power in Congress to con-

fer jurisdiction upon the Circuit Courts of Appeals in such cases.

There can be no doubt that a proceeding to review a decision of the Board of Tax Appeals involves adverse parties and rights which may be prejudicially affected or wrongs to be remedied. The fact that the proceeding originated before an administrative body is not decisive since the decisions of this Court furnish many familiar precedents for similar reviews.

The judgment of the Circuit Courts of Appeals becomes the final and indisputable basis of administrative action. When a taxpayer appeals to a Circuit Court of Appeals he must either pay the tax or file a bond to insure its payment. Thus no process of the court is necessary to enforce its judgment.

This case was pending before the Board of Tax Appeals when the Revenue Act of 1926 was passed and there is some question whether the taxpayer has a right to pay the tax and institute an action for its recovery even after a decision of the Circuit Court of Appeals against him. This question is peculiar to the cases which were pending before the Board at the time of the passage of the 1926 Act, since it is clear that no such right exists in cases which were filed with the Board thereafter. The Act may be construed so that the right to relitigate the question is not open in any case, and we urge the familiar principle that a statute should always be given a construction which will make it valid. However, even if the statute must be construed so as to

give a taxpayer whose case was pending before the Board of Tax Appeals when the 1926 Act was passed a right to relitigate the matter, still the proceeding may be a case or controversy, if the doctrine announced in the Naturalization Cases is applicable. Moreover, a taxpayer always has the right to litigate the same question in a new suit against the collector. *Sage* v. *United States,* 250 U. S. 33.

In this case the Circuit Court of Appeals acts as an appellate tribunal and not as a tribunal of original jurisdiction, although to the extent that the Circuit Court of Appeals may require the taking of additional testimony, the proceeding may be regarded as in the nature of an original proceeding. The same situation existed in *United States* v. *Lies,* 170 U. S. 628, where this Court held that a review of a decision of the Board of General Appraisers was appellate in character. From this it follows that this proceeding in the Circuit Court of Appeals is a "case" within the meaning of Title 28, United States Code, Section 346, in which that court is authorized to certify any question deemed necessary for its proper decision. The certificate raises a single question of law and not the whole case. Under such circumstances, we submit that the jurisdiction exercised by this Court is intrinsically appellate and not an attempt to exercise an original jurisdiction not conferred by the Constitution.

It has always been the practice of the Treasury Department to compute total income by adding to the amount actually received by the taxpayer any

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tax which another has paid for his benefit under an agreement between the parties. In earlier years there was a lack of uniformity in treatment and in some cases the amount of *additional* tax paid by another was in turn added to the taxpayer's income. However, in 1923, the Treasury Department settled on the practice of adding only the original tax paid by another for the benefit of the taxpayer and abandoned any attempt to treat the additional tax as additional income. This practice has been consistently followed ever since and is now the settled policy of the Treasury Department.

There is no statute which specifically recognizes the principle of constructive receipt of income. Taxes paid by another for the benefit of the taxpayer constitute income to the latter. Thus the amount is embraced within the term "gross income" as defined in Section 213 (a) of the Revenue Act of 1918. The Treasury Department has consistently followed the policy of holding taxpayers accountable for income constructively received and the acquiescence of Congress in the practice amounts to a legislative sanction.

ARGUMENT

I

A PROCEEDING IN THE CIRCUIT COURT OF APPEALS TO REVIEW A DECISION OF THE BOARD OF TAX APPEALS IS A CASE OR CONTROVERSY WITHIN THE MEANING OF THE CONSTITUTION

The principle is settled that courts created by law to exercise the judicial power conferred by the

Constitution are purely judicial bodies. *Gordon* v. *United States,* 117 U. S. 697. In reviewing decisions of the United States Board of Tax Appeals the Circuit Courts of Appeals exercise judicial power, and consequently it was within the competency of Congress to confer jurisdiction on them in such cases.

The Board of Tax Appeals was established and continued as an independent agency in the executive branch of the Government by Section 900 (a) of the Revenue Act of 1924 and Section 1000 of the Revenue Act of 1926, and it is obvious that the Board is not a court created under the authority of Article III of the Constitution. This Court, however, has recognized that the Board exercises functions of a judicial character. *Blair* v. *Oesterlein Co.,* 275 U. S. 220. While it is true that the Board also exercises administrative functions which may not be reviewed by the courts (*Williamsport Co.* v. *United States,* 277 U. S. 551), the proceeding before the Board in the instant case involved a judicial determination of the same character as the decisions of the Court of Claims or of the United States District Courts in suits to recover taxes paid.

The case is reviewed upon the record made before the Board of Tax Appeals, which is prepared in accordance with rules adopted by the Circuit Courts of Appeals. (Section 1001 (b), Revenue Act of 1926.) The statute prescribes that the rules of evidence applicable in courts of equity of the

District of Columbia shall govern in proceedings before the Board of Tax Appeals. (Section 1000 (907 (a)), Revenue Act of 1926.) Accordingly, a decision of the Board of Tax Appeals is reviewed in the Circuit Court of Appeals upon a record which conforms to that made up in a proceeding in a District Court.

It was for these reasons that Congress determined that there could be no objection to imposing upon the Circuit Courts of Appeals the duty of reviewing the decisions of the Board. (Senate Report No. 52; House Report No. 1, 69th Congress, First Session. See Appendix B.) Those reports definitely show that Congress was satisfied that a review of the decisions of the Board could constitutionally be had by direct appeal to the courts.

There is a long line of decisions of this Court dealing with the question of the essential elements of a constitutional case or controversy, but it is not deemed necessary to enter into a detailed analyzation of those cases. They establish:

(1) That it is not within the power of Congress to assign to courts of the United States (other than those of the District of Columbia) any duties except such as involve a "case" or "controversy" within the meaning of the Constitution (*Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40);

(2) That for a proceeding to constitute a case or controversy within the meaning of the Constitution there must be (a) adverse parties (*Muskrat* v. *United States,* 219 U. S. 346; *United States* v.

Ferreira, 13 How. 40; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70), (b) a proceeding affecting rights in themselves appropriate subjects of judicial cognizance or a wrong to be redressed or prevented (*Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70), (c) finality to the judgment of the court (*Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *Hayburn's Case,* 2 Dall. 409; *Alexander* v. *United States,* 201 U. S. 117; *Frasch* v. *Moore,* 211 U. S. 1; *Baldwin Co.* v. *Howard Co.,* 256 U. S. 35; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693), and (d) power in the court to enforce any judgment which may be given (*Muskrat* v. *United States,* 219 U. S. 346; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *United States* v. *Ferreira,* 13 How. 40);

(3) That Congress has power to provide for the review of the action of administrative commissions or boards created by it which exercise only quasi judicial powers (*Stephens* v. *Cherokee Nation,* 174 U. S. 445; *United States* v. *Ritchie,* 17 How. 525); and

(4) That the power of the courts can be invoked in aid of an administrative body in the performance of its statutory duty (*Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447), even though that aid involve a review of questions of fact as well as questions of law, unless the aid sought would bring the courts in such intimate connection with the legislative power that it would result in the revision by

the courts of a legislative discretion confided to the administrative body (*Keller* v. *Potomac Electric Co.*, 261 U. S. 428).

In *Osborn* v. *United States Bank*, 9 Wheat. 738, Chief Justice Marshall construed Article III of the Constitution as follows (p. 819):

> * * * This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.

Applying these tests to a proceeding to review a decision of the Board of Tax Appeals, we assume it will not be questioned that such an appeal meets the requirements that there be adverse parties and that the proceeding involve rights which may be prejudicially affected or wrongs to be remedied. It would seem only necessary to consider (1) whether the aid sought of the courts is to review a judicial, rather than a legislative or administrative determination; (2) whether there is authority to enforce such a judgment; and (3) whether the judgment is lacking in finality.

1. The fact that the proceeding originated before an administrative body is not decisive. *United States* v. *Ritchie,* 17 How. 525; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447; *Stephens* v. *Cherokee Nation,* 174 U. S. 445. While it may be said that upon transfer to the courts those proceedings were suits *de novo,* it is clear that whether its jurisdiction is original or appellate a court created under Article III of the Constitution can only consider a proceeding which meets all of the tests of a constitutional case or controversy. Accordingly, it is unimportant that those cases may be characterized as suits *de novo.* Furthermore, it is clear from an examination of the appellate procedure provided for the Federal Trade Commission (Act of September 26, 1914, c. 311, Section 5, 38 Stat. 717, 719; U. S. C. Title 15, Section 45) that a purely appellate review of the action of an administrative board violates no constitutional provision. In *L. B. Silver Co.* v. *Federal Trade Commission,* 292 Fed. 752, the Circuit Court of Appeals for the Sixth Circuit had held that its jurisdiction in such cases was original. This Court, however, in *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U. S. 619, said that the review was "appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

The appellate procedure established in the Revenue Act of 1926 is closely analogous to the appellate procedure established in the Act of June 10,

1890, c. 407, Sections 14 and 15, 26 Stat. 131, 137, 138, providing for the collection of the customs revenue. Section 15 provided for a review in the Circuit Court upon the record and the evidence taken by the Board of General Appraisers, together with a certified statement of the facts and the decision of the Board. The section further provided that upon application of the parties the case should be referred to one of the members of the Board of General Appraisers to take and return such further evidence as should be offered by the parties. The findings of the Board of General Appraisers, like the findings of the Board of Tax Appeals, were not disturbed by the courts unless the evidence wholly failed to support them. *In re Van Blankensteyn,* 56 Fed. 474, 477; *Marine* v. *Lyon,* 65 Fed. 992, 994.

The decision of this Court in *United States* v. *Lies,* 170 U. S. 628, shows that the review in the Circuit Courts was not a suit *de novo*. In that case the importer took an appeal to the Circuit Court from the decision of the Board of General Appraisers. The Government took no appeal but sought to be heard when the importer abandoned his appeal. The Circuit Court held that the Government could not be allowed to object to the decision of the Board because it had not sought a review of such decision. The judgment of the Circuit Court was affirmed by the Circuit Court of Appeals and the case was brought to this Court by a writ of certiorari. The judgment was affirmed, the Court saying (p. 636):

> Although the Circuit Court has, upon the application of the parties, power to take further testimony after the case is brought before it, and to that extent it may be regarded as something in the nature of a new proceeding, yet the proper procedure in deciding the appeal is in nowise altered thereby, and unless a party has appealed, and filed and served his statement as above mentioned, the court ought not to reverse on his motion.
>
> It is immaterial that the application is not named an appeal. It is such in substance, and the grounds and reasons for the appeal are to be stated. Although the board of general appraisers may not be a court, yet the proceedings to review its determination are pointed out by the statute, and they must be substantially followed and obeyed.

Thus it is clear that the review in the courts of the decisions of the Board of General Appraisers was an appellate proceeding and not a suit *de novo*. Many cases came to this Court involving that procedure but the jurisdiction was never questioned. *United States* v. *Passavant*, 169 U. S. 16; *United States* v. *Klingenberg*, 153 U. S. 93; *United States* v. *Schoverling*, 146 U. S. 76. On the contrary, the procedure was cited by this Court as an example of a proper method of reviewing determinations of an administrative body. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714.

In *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, the question was whether the Court

of Appeals of the District of Columbia had jurisdiction under Section 9 of the Act of February 20, 1905, c. 592, 33 Stat. 724, 727. That section provided that—

> If an applicant * * * is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the court of appeals of the District of Columbia * * *.

This Court held that it was without jurisdiction to review the action of the District Court of Appeals, not because the suit in that court was an appeal from an administrative body, but because the judgment to be given was administrative rather than judicial.

Since this Court has reviewed many proceedings which originated in the Federal Trade Commission and many proceedings which originated in the Board of General Appraisers and in both cases has characterized the review in the courts as appellate, we take it as settled that the courts may properly exercise their judicial power to review a proceeding commenced before an administrative body, even though the review in the courts is appellate and not a suit *de novo*.

2. While the judgment is not enforced through any process of the court it does become "the final and indisputable basis of action." *In re Sanborn, supra.* If the judgment results in sustaining the tax, Section 274 (b) of the Revenue Act of 1926 lays a positive duty upon administrative officers to assess and collect it. The same section prohibits

the collection of a deficiency which has been disallowed by the judgment, and Section 284 (e) requires the administrative officers to give effect to a finding that the taxpayer has overpaid his tax. When the appeal to the courts is taken by the taxpayer, Section 1001 (c) provides that the tax must be paid or a bond given to secure its payment. Thus the payment of the tax is safeguarded and no process of the court is necessary to collect it. The bond is, therefore, to be regarded as the equivalent of the money and so the satisfaction of the Government's claim has been anticipated and provided for.

We think that such a complete system already provided for giving effect to the judgment of the court may be said for all practical purposes to satisfy the requirement that there must be power to enforce the judgment. The judgment in *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, was similarly enforceable through the executive departments instead of through an award of execution by the court, but this Court nevertheless held that a case in the constitutional sense was presented for its consideration. *Fidelity Nat. Bank* v. *Swope,* 274 U. S. 123, clearly disposes finally of any contention that the award of execution is an indispensable element of a constitutional case or controversy. In that decision (p. 132) there are collected "familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to

carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties."

Unlike the officers in the *Gordon case, supra,* the administrative officers here are charged with the positive duty of collecting the tax or of abating it. It seems to be accepted that such a procedure satisfies the requirement of the power to enforce the judgment. Accordingly, we submit that the appellate procedure here under consideration is free from objection upon that score.

3. The Commissioner's letter notifying Mr. Wood of the deficiency in taxes which gave rise to this case was dated June 27, 1925. (R. 5.) The petition for review by the Board of Tax Appeals was filed August 22, 1925, and the hearing was held April 11, 1927. (R. 5.) These facts show that the case was pending before the Board of Tax Appeals when the Revenue Act of 1926 was enacted on February 26, 1926, and bring the case within the purview of Section 283(b) of that Act. That section provides that in such a case the powers, duties, rights, and privileges of the Commissioner and the taxpayer, and the jurisdiction of the Board and of the courts shall be governed by the Revenue Act of 1926, with the exception that the taxpayer shall not be subject to the provisions of Section 284(d). The latter section provides that if the taxpayer, *after the enactment of the Act of 1926,* files a petition with the Board of Tax Appeals—

> no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court—

with certain exceptions not material. The effect of these provisions is to compel such a taxpayer to elect whether to follow the method of review by way of the Board of Tax Appeals, or to pay the tax and bring suit in the ordinary way. If he elects the former method of review, the statute takes away all other methods.

The situation with respect to the taxpayer whose case was pending before the Board of Tax Appeals when the 1926 Act went into effect seems to be this: At the time he filed his petition he was required to make no election. Should the Board of Tax Appeals decide against him, he could then pursue his ordinary remedy in the courts. Congress properly deemed it unfair to him, and perhaps unconstitutional, to visit upon him consequences following an appeal to the Board of Tax Appeals which did not follow at the time he took that appeal. The intent of Section 283 (b), which said that he should not be subject to the provisions of Section 284 (d), was to leave him with the same remedies which he would have had, if the 1926 Act had not been passed. It went further, however, and gave him the right to take advantage of the 1926 Act, if he so elected. The latter Act, however, contained the provision

that the decision of the Circuit Court of Appeals should be final, unless reviewed by this Court. (Section 1003 (a).) It does not seem to be necessary to hold that the right given to appeal to the Circuit Court of Appeals must be deemed a right independent of and additional to the right to pursue the ordinary remedy by suit. The rights to the taxpayer and the purpose of the statute will be completely served if its provisions are construed so as to permit such a taxpayer, after decision by the Board of Tax Appeals, to elect either to proceed in accordance with the 1924 Act or to proceed in accordance with the 1926 Act. The other construction, namely, that it preserved the taxpayer's right to proceed in the ordinary way, and at the same time gave him the right to proceed under the 1926 Act without making the latter procedure final, is neither necessary, nor in accordance with familiar principles of statutory construction. In the first place, it would tend to cast doubt upon the constitutionality of the Act, something always to be avoided. In the second place, it would be contrary to the general policy of the law, recognized in the doctrine of *res adjudicata*. In the third place, it would tend to multiply litigation unnecessarily, something always to be regarded with disfavor. So long as the taxpayer's rights as they existed at the time he took his appeal to the Board of Tax Appeals are preserved, no injustice has been done him nor has he been deprived of anything. When, however, he elects to avail

himself of the new privileges granted by the Act, he ought to be held subject to the limitations which are attached to the privilege. In effect, he is not given two remedies, but rather, a choice between two remedies, and his election of one is a waiver of the other. Such a construction would satisfy every requirement of finality.

Another possible construction, the effect of which would be to give finality to the decision of the court upon appeal from the Board of Tax Appeals, is that Section 1003(a) of the 1926 Act, making the judgment of the courts upon a review of a decision of the Board final, means final in the sense that the ordinary principles of *res adjudicata* apply to it. Under such a construction a taxpayer might not be barred from bringing a suit in a District Court, nevertheless he might be met with the plea of *res adjudicata* if, as a matter of fact, the issue which he was attempting to relitigate was one which had been decided by the courts in a proceeding to review a decision of the Board of Tax Appeals. Section 283(b) merely relieves the taxpayer from the prohibition of Section 284(d), and does not itself grant any affirmative right to sue. Construing the statute in that way, there was no lack of finality in the judgment in the instant proceeding.

If, however, the provisions are to be construed as permitting the taxpayer to relitigate in a United States District Court the very questions presented to the courts by an appeal from the Board of Tax

Appeals, there may be a question whether in such cases those decisions have the finality requisite to a constitutional case.

However, the objection of a lack of finality would seem to be only one-sided, since there is no right given the Treasury Department further to litigate questions decided in the proceeding before the Board of Tax Appeals, and the decision in such a proceeding is a final and indisputable basis of administrative action. At the most, therefore, any objection as to lack of finality is confined to the effect of the judgment upon the taxpayer, and apparently he always has had the right to litigate the same questions in a new suit against the collector. *Sage* v. *United States,* 250 U. S. 33.

In any event, if the statute must be construed so as to give a taxpayer whose case was pending before the Board when the 1926 Act was passed a right to relitigate the same questions which have been decided after appeal to the courts from the Board of Tax Appeals, such a proceeding may still be a case in the constitutional sense if the decisions in *United States* v. *Ness,* 245 U. S. 319, and *Tutun* v. *United States,* 270 U. S. 568, are applicable. The *Ness* case was brought under Section 15 of the Naturalization Act in a United States District Court to cancel a certificate of naturalization issued by a State court. This Court held that the decision in the first proceeding was not *res judicata,* but that the United States, after having entered its appearance in the naturalization court, might file an independent suit

to cancel the certificate and urge the very grounds which were overruled by the naturalization court. In the *Tutun* case, this Court held that such a petition for naturalization is clearly a case within the meaning of the Constitution. That the naturalization proceeding in the *Ness* case was had in a State court is unimportant since the same conclusion was reached in *Maney* v. *United States,* 278 U. S. 17, where the naturalization certificate was obtained in a United States District Court.

It should be noted that the existence of the jurisdiction in cases within the scope of Section 283 (b) and (f) has been assumed without discussion by all of the Circuit Courts of Appeals which have reviewed such cases. It has been exercised by the Circuit Courts of Appeals in all but the Sixth Circuit.[1] In that Circuit no decision involving such a case has as yet been rendered.

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[1] In the following cases the Circuit Courts of Appeals have entertained jurisdiction of petitions to review decisions of the Board of Tax Appeals in cases arising under Section 283 (b) or (f): First Circuit: *Hamilton* v. *Commissioner*, 24 F. (2d) 668; *Commissioner* v. *Old Colony Railroad*, 26 F. (2d) 408; *De Ford* v. *Commissioner*, 29 F. (2d) 532; *Rhode Island Hospital T. Co.* v. *Commissioner*, 29 F. (2d) 339. Second Circuit: *Fraser* v. *Commissioner*, 25 F. (2d) 653; *De Ver H. Warner, etc.*, v. *Commissioner*, 26 F. (2d) 1023; *DeLoss* v. *Commissioner*, 28 F. (2d) 803; *Wm. C. Shanley, Jr.*, v. *Commissioner*, 28 F. (2d) 1018; *Oswego & S. R. Co.* v. *Commissioner*, 29 F. (2d) 487; *Hardwick Realty Co.* v. *Commissioner*, 29 F. (2d) 498; *Ice Service Co.* v. *Commissioner*, 30 F. (2d) 230. Third Circuit: *Bishoff* v. *Commissioner*, 27 F. (2d) 91; *Thompson* v. *Commissioner*, 28 F. (2d) 247; *Saunders* v. *Commissioner*,

We are advised that there are now pending in the Circuit Courts of Appeals approximately 200 cases like the one at bar in which the appeal to the Board of Tax Appeals was taken before the 1926 Act was passed, and that there are approximately 1,000 cases now pending before the Board of Tax

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29 F. (2d) 834. FOURTH CIRCUIT: *Lavenstein Corporation* v. *Commissioner*, 25 F. (2d) 375; *Wheeling Tile Co.* v. *Commissioner*, 25 F. (2d) 455; *MacCorkle* v. *Commissioner*, 26 F. (2d) 247; *Kleeson Co.* v. *Blair*, 28 F. (2d) 557. FIFTH CIRCUIT: *Avery* v. *Commissioner*, 22 F. (2d) 6; *Brown* v. *Commissioner*, 22 F. (2d) 797; *Harry S. Kaufman* v. *Commissioner*, 24 F. (2d) 44; *Southport Mill* v. *Commissioner*, 26 F. (2d) 17; *New Orleans Shipwright Co.* v. *Commissioner*, 27 F. (2d) 214; *Carr* v. *Commissioner*, 28 F. (2d) 551; *Lee* v. *Commissioner*, 28 F. (2d) 551; *Reinschmidt* v. *Commissioner*, 28 F. (2d) 660; *Zimmern* v. *Commissioner*, 28 F. (2d) 769; *Daniel Bros. Co.* v. *Commissioner*, 28 F. (2d) 761; *R. L. Crook* v. *Commissioner*, 23 F. (2d) 1000; *Richmond Hosiery Mills* v. *Commissioner*, 29 F. (2d) 262; *Blair* v. *Mathews*, 29 F. (2d) 892; *W. J. Howard* v. *Commissioner*, 29 F. (2d) 895. SEVENTH CIRCUIT: *Arthur R. Jones Syndicate* v. *Commissioner*, 23 F. (2d) 833; *Kosmerl* v. *Commissioner*, 25 F. (2d) 87; *Metropolitan Business College* v. *Blair*, 24 F. (2d) 176; *W. S. Bogle & Co.* v. *Commissioner*, 26 F. (2d) 771; *Fred L. Mandel* v. *Blair*, 26 F. (2d) 1019; *North American Ry. Const. Co.* v. *Commissioner*, 27 F. (2d) 493; *Buttolph* v. *Commissioner*, 29 F. (2d) 695; *Greengard* v. *Commissioner*, 29 F. (2d) 502. EIGHTH CIRCUIT: *Ruth Iron Co.* v. *Commissioner*, 26 F. (2d) 30; *Mastin* v. *Commissioner*, 28 F. (2d) 748; *Minnehaha Nat. Bank* v. *Commissioner*, 28 F. (2d) 763; *Conklin-Zonne-Loomis Co.* v. *Commissioner*, 29 F. (2d) 698; *Kendrick Coal & Dock Co* v. *Commissioner*, 29 F. (2d) 559; *Denver Live Stock Com'n. Co.* v. *Commissioner*, 29 F. (2d) 543. NINTH CIRCUIT: *Royal Packing Co.* v. *Commissioner*, 22 F. (2d) 536; *Blair* v. *Roth*, 22 F. (2d) 932; *Lassen Lumber & Box Co.* v. *Blair*, 27 F. (2d) 17.

Appeals and not yet decided by it, in which the appeals were taken to the Board before the 1926 Act was passed. If the section dealing with appeals taken to the Board of Tax Appeals before the 1926 Act was passed be construed to deprive the judgments of the United States Circuit Court of Appeals of finality, a serious situation is presented.

In respect of cases where the appeals to the Board were taken after the 1926 Act was passed and where, by the plain provisions of the statute, judgments of the Circuit Courts of Appeals finally determine the rights of the parties and become the final and indisputable basis for satisfaction of the taxpayer's liability, it seems to be clear that a case or controversy is presented to the Circuit Court of Appeals. Any doubt with regard to finality is confined to the cases which were pending before the Board at the time the 1926 Act was passed, and that doubt is not, we submit, insuperable.

If it should be necessary to hold the appellate procedure invalid as it affects cases which were pending before the Board of Tax Appeals at the time of the passage of the 1926 Act, we think it is obvious that the saving clause of Section 1213 of the Act will permit the appellate procedure with respect to cases filed later to remain unaffected. There is no necessary relation between the two classes of cases which will prevent the separation of the invalid portion, leaving the appellate procedure in full force with respect to those cases filed with the Board of Tax Appeals after the passage of the 1926 Act.

II

WHETHER THE CIRCUIT COURT OF APPEALS, IN REVIEWING DECISIONS OF THE BOARD OF TAX APPEALS, ACTS AS A TRIBUNAL OF ORIGINAL JURISDICTION OR AS AN APPELLATE TRIBUNAL, IT MAY CERTIFY TO THIS COURT QUESTIONS DEEMED NECESSARY FOR THE PROPER DECISION OF A PENDING CAUSE

Referring to the judicial power of the United States, Chief Justice Marshall, in *Osborn* v. *United States Bank,* 9 Wheat. 738, 829, said:

> In these cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States can not be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct.

Apparently, the judicial power of the United States may be exercised first in its appellate form. In *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U. S. 619, this Court said that the review by the Circuit Court of Appeals in Federal Trade Commission cases was "appellate and revisory merely and not an exercise of original jurisdiction by the Court itself." See also *United States* v. *Lies,* 170 U. S. 628.

While the review of the Circuit Court of Appeals seems to be appellate in form, the statute authorizes the court to remand the case for a rehearing. (Section 1003(b), Revenue Act of 1926.) To the extent that the Circuit Court of Appeals may require the taking of additional testimony, the pro-

ceeding may be regarded as in the nature of a new proceeding. On the question whether a case in the constitutional sense is presented, however, it seems to be immaterial whether the proceeding is a suit *de novo* or an appeal.

If the Circuit Court of Appeals acts as an appellate tribunal, there can be no doubt that it may certify to this Court questions deemed necessary for the proper decision of a pending cause. If, however, the proceeding in the Circuit Court of Appeals is regarded as calling for the exercise of original jurisdiction by that court, the question arises whether the original jurisdiction of this Court is invoked when it considers a certificate from a Circuit Court of Appeals. In this connection it is interesting to note that in the revision of the Judicial Code by the Act of February 13, 1925 (c. 229, 43 Stat. 936), Section 239 was changed so that the former language "in any case within its appellate jurisdiction" now appears as "in any case, civil or criminal."

Historically, this Court for many years entertained and decided questions certified as a part of its appellate jurisdiction. Section 6 of the Act of April 29, 1802 (c. 31, 2 Stat. 156, 159), provided for the certification of distinct questions of law by the Circuit Courts in advance of decision or judgment there. That Act was superseded by the Act of June 1, 1872 (c. 255, 17 Stat. 196). This legislation is set forth in a footnote to *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 215

U. S. 216, 222. Sections 650, 652, and 693 of the Revised Statutes restricted the Act of 1872 to civil suits and proceedings, and by Sections 651 and 697 the provisions of Section 6 of the Act of 1802 were reenacted as to criminal cases. (*United States* v. *Rider,* 163 U. S. 132, 136.) The first Act of Congress which authorized a criminal case to be brought from a Circuit Court to this Court except upon a certificate of difference of opinion was the Act of February 6, 1889 (c. 113, 25 Stat. 655).

The following decisions of this Court show the practice respecting certificates under the Act of 1802:

United States v. *Bailey* (1885), 9 Pet. 267.
Veazie v. *Wadleigh* (1837), 11 Pet. 55.
Adams v. *Jones* (1838), 12 Pet. 207.
White v. *Turk* (1838), 12 Pet. 238.
Nesmith v. *Sheldon* (1848), 6 How. 40.
United States v. *Chicago* (1849), 7 How. 185.
Webster v. *Cooper* (1850), 10 How. 54.
Ex parte Milligan (1866), 4 Wall. 2.
United States v. *Northway* (1886), 120 U. S. 327.
United States v. *Perrin* (1888), 131 U. S. 55.

This court assumed jurisdiction in those cases save where the certificate was so broad that it brought the whole case to this Court. In *United States* v. *Chicago, supra,* the Court assumed jurisdiction despite a dissenting opinion by Mr. Justice

Catron, in which he expressed the view that the Court was asked to grant an injunction which was an exercise of original jurisdiction.

In *Veazie* v. *Wadleigh, supra* (p. 60), the procedure was referred to as "a novel mode of obtaining the decision of an appellate court."

In *White* v. *Turk, supra*, it was held that the Court was without jurisdiction because the certificate brought up the whole case, and a distinction was there made between such a certificate and one which presented a single definite question of law. At page 239 it was said:

> This certificate, therefore, brings the whole cause before this court; and if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction.

The certificates in *Nesmith* v. *Sheldon,* and *Webster* v. *Cooper, supra,* were dismissed for want of jurisdiction because the whole case was certified. In *Webster* v. *Cooper,* Chief Justice Taney said (p. 55):

> This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction, in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals.

A similar expression is found in the opinion of *United States* v. *Perrin, supra,* at page 58.

In *State* v. *Crocker*, 5 Wyo. 385, the Supreme Court of Wyoming held that in entertaining certificates from inferior courts it was exercising appellate jurisdiction.

We submit that this long-continued practice establishes that when, as in this case, a certificate is presented which raises a single question of law and not the whole cause, the jurisdiction exercised by this Court is intrinsically appellate and not original.

However, as already pointed out, we think the decisions in *Federal Trade Commission* v. *Eastman Kodak Co.*, and *United States* v. *Lies, supra,* justify the belief that the Circuit Courts of Appeals exercise appellate jurisdiction when reviewing decisions of such a tribunal as the Board of Tax Appeals.

III

TAXES PAID BY ANOTHER FOR THE BENEFIT OF THE TAXPAYER HAVE CONSISTENTLY BEEN REGARDED BY THE TAXING OFFICERS AS ADDITIONAL INCOME TO THE TAXPAYER

There is attached hereto as Appendix C a letter from the Commissioner of Internal Revenue showing that it has always been the practice of the Treasury Department to compute total income by adding to the amount actually received by the taxpayer, the amount of any tax which another has paid for his benefit under an agreement between the parties. It is true that in earlier years there was

a lack of uniformity in treatment and that in some cases the amount of *additional* taxes paid by another was in turn added to the taxpayer's income. Since 1923, however, the practice has been settled and the Treasury Department has added only the *original* tax paid by another, and abandoned any attempt to treat the *additional* tax as additional income.

It is also true that neither before nor since 1923 has the Treasury Department ever resorted to an algebraic formula to compute the tax.

IV

THE AMOUNT OF TAX PAID BY THE EMPLOYER IN THIS CASE FOR THE BENEFIT OF THE EMPLOYEE IS REACHED BY APPLICABLE STATUTES IMPOSING UPON THE EMPLOYEE A TAX UPON INCOME DERIVED FROM PERSONAL SERVICES

There are no applicable statutes dealing specifically with the question of constructive receipt of income. However, applicable statutes imposed taxes upon income derived from personal services. When, as in this case, an employer agrees in advance, in consideration of the services rendered by his employee, to "pay any and all income taxes" imposed upon the employee's salary, the amount of the tax so paid by the employer for the benefit of the employee is constructively received by the employee and constitutes a part of his gross income.

The cases cited in the Commissioner's first brief demonstrate that the principle of constructive re-

ceipt is too well established to be questioned. That this principle is no modern innovation is shown by the fact that Article V of the Articles of Confederation, dealing with delegates in Congress, provided:

> Nor shall any person, being a delegate, be capable of holding any office under the United States for which he, *or another for his benefit* receives any salary, fees, or emolument of any kind. (Italics supplied.)

West End St. Ry. Co. v. *Malley* (C. C. A. 1st), 246 Fed. 625 (certiorari denied, 246 U. S. 671), shows that the principle was applied by the Treasury Department in assessing taxes under the Act of August 5, 1909, c. 6, 36 Stat. 11, 112, and in assessing taxes under the Act of October 3, 1913, c. 16, 38 Stat. 114, 166. The tax was sustained as to the 1913 Act by the above-cited decision of the Circuit Court of Appeals, on December 10, 1917. Certiorari was denied by this Court April 15, 1918. In the Revenue Acts passed since that time, Congress has evinced no disapproval of the practice and such acquiescence of Congress amounts to a legislative sanction. *National Lead Co.* v. *United States,* 252 U. S. 140. The inaction of Congress in this matter is especially significant when it is remembered that a similar practice of the Treasury Department in dealing with taxes withheld at the source was promptly ended by a specific provision in the Revenue Act of 1921, c. 136, Section 234 (a) (3), 42 Stat. 227, 254. (See original brief, p. 16.)

CONCLUSION

It is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the affirmative.

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APRIL, 1929.

APPENDIX A

REVENUE ACT OF 1924, ACT OF JUNE 2, 1924, C. 234, 43 STAT. 253

SEC. 274. (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired. (U. S. C., Title 26, Sec. 1049.)

SEC. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

(b) Each member of the Board shall be appointed by the President, by and with the advice

and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. The term of office of all members who are to compose the Board during the period of two years after the enactment of this Act, shall expire at the end of such period. The terms of office of the first seven members who are thereafter to compose the Board shall expire, two at the end of the fourth year, two at the end of the sixth year, two at the end of the eighth year, and one at the end of the tenth year, after the expiration of such two-year period. The term of office of each such member shall be designated by the President, and the terms of office of their successors shall expire ten years after the expiration of their predecessors' terms, except that any individual appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor, and a member in office at the expiration of the term for which he was appointed may continue in office until his successor is qualified. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason. Each member shall receive a salary at the rate of $7,500 per annum.

* * * * *

(g) In any proceeding in court under sections 274, 279, 308, or 312, and in any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board shall be prima facie evidence of the facts therein stated. (U. S. C., Title 26, Secs. 1211–1213, 1218.)

REVENUE ACT OF 1926, ACT OF FEBRUARY 26, 1926, C. 27, 44 STAT. 9

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed

or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing. (U. S. C. App., Title 26, Sec. 1048.)

SEC. 277. (b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 279. (a) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the Commissioner

shall mail a notice under such subdivision within 60 days after the making of the assessment.

(c) The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of subdivision (f) of section 274 and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or is subsequently filed, and the Board shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

(d) If the jeopardy assessment is made after the decision of the Board is rendered such assessment may be made only in respect of the deficiency determined by the Board in its decision.

(e) A jeopardy assessment may not be made after the decision of the Board has become final or after the taxpayer has filed a petition for review of the decision of the Board.

(f) When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final,

together with interest thereon as provided in subdivision (j) of this section.

(g) If the bond is given before the taxpayer has filed his petition with the Board under subdivision (a) of section 274, the bond shall contain a further condition that if a petition is not filed within the period provided in such subdivision, then the amount the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subdivision.

(h) Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(i) When the petition has been filed with the Board and when the amount which should have been assessed has been determined by a decision of the Board which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated.

If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 284. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

(j) In the case of the amount collected under subdivision (i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under subdivision (i) of this section, or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in subdivision (j) of section 274. If the amount included in the notice and demand from the collector under subdivision (i) of this section is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month (or, for any period the estate of the taxpayer is held by a fiduciary appointed by any court of competent jurisdiction or by will, at the rate of 6 per centum per annum) from the date of such notice and demand until it is paid.

(k) No claim in abatement shall be filed in respect of any assessment made after the enactment of this Act in respect of any income, war-profits, or excess-profits tax. (U. S. C. App., Title 26, Secs. 1051, 1063.)

SEC. 282. (a) Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the provisions of subdivision (a) of section 274, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claim for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver. (U. S. C. App., Title 26, Sec. 1071.)

SEC. 283. (b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In

all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

* * * * *

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284. (U. S. C. App., Title 26, Sec. 1064.)

SEC. 284. (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Such refund

or credit shall be made either (1) if claim therefor was filed within the period of limitation provided for in subdivision (b) or (g), or (2) if the petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by this Act, within three years after the tax was paid. (U. S. C. App., Title 26, Sec. 1065.)

TITLE X.—BOARD OF TAX APPEALS

SEC. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

TITLE IX.—BOARD OF TAX APPEALS

Membership of Board

SEC. 900. The Board of Tax Appeals (hereinafter referred to as the "Board") is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act. (U. S. C. App., Title 26, Secs. 1211–1222.)

SEC. 901 (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each

member shall receive salary at the rate of $10,000 per annum.

(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth year, four at the end of the tenth year, and four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. (U. S. C. App., Title 26, Sec. 1213.)

* * * * *

SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment. (U. S. C. App., Title 26, Sec. 1216.)

* * * * *

SEC. 906. (f) The findings of the Board made in any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be prima facie evidence of the facts therein stated. (U. S. C. App., Title 26, Sec. 1218.)

SEC. 907. (a) Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public and shall be stenographically reported. The Board is authorized to contract for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The mailing by registered mail of any pleading, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, order, notice, or process.

(b) It shall be the duty of the Board and of each division to make findings of fact and a decision in each case before it, and report thereon in writing; except that the findings of fact and report thereon may be omitted in case of a decision dismissing any proceeding

upon motion either of the taxpayer, the Commissioner, or the Board. Whenever the Board deems it advisable, the report shall contain an opinion in writing in addition to the findings of fact and decision.

(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents. * * *
(U. S. C. App., Title 26, Sec. 1219.)

SEC. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpoena ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent. (U. S. C. App., Title 26, Sec. 1220.)

SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926. (U. S. C. App., Title 26, Sec. 1220.)

SEC. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax. (U. S. C. App., Title 26, Sec. 1223.)

SEC. 1001. (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such

rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

* * * * *

(c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under Title II or Title III of the Revenue Act of 1924 or of this Act. If as a result of a waiver under subdivision (d) of section 274 or subdivision (d) of section 308 any part of the amount determined by the Board is paid after the filing of the review bond such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the

amount so disallowed shall be credited or refunded to the taxpayer, or, if collection has not been made, shall be abated. (U. S. C. App., Title 26, Sec. 1224.)

SEC. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. (U. S. C. App., Title 26, Sec. 1226.)

SEC. 1122. (a) If any person is summoned under this Act to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data. (U. S. C. App., Title 26, Sec. 1258.)

SEC. 1213. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby. (U. S. C. App., Title 26, Sec. 1271.)

APPENDIX B

Senate Report No. 52, and House Report No. 1, 69th Congress, First Session, explain the court review of decisions of the Board of Tax Appeals in practically identical language. The following is taken from the Senate Report (pp. 36–37):

> *Court review—Questions of fact and law.*—The procedure for review of determinations of the board is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the Packers and Stockyards Act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of Section 1003 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper

interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 of the revenue act of 1924 as amended in the pending bill and subdivision (b) of section 1003 of the pending bill). The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy such as injunction, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax

in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

The principles discussed in the preceding paragraph are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, as in the importation of merchandise and the admission of aliens. In adhering to such principles the committee is of the opinion that it is establishing an appellate procedure that is unquestionably constitutional.

Jury trial need not be granted in the proposed procedure for the reason that the proceeding is not one at common law within the meaning of the provisions of the Constitution. It is of course true in addition that the taxpayer may, by paying his tax and suing the collector for a refund instead of petitioning the board, obtain a jury trial if he desires it.

APPENDIX C

TREASURY DEPARTMENT,
Washington, April 2, 1929.

Hon. MABEL WALKER WILLEBRANDT,
Assistant Attorney General,
Department of Justice, Washington, D. C.

Attention: Mr. Sewall Key.

In re: Old Colony Trust Company et al, Executors, Estate of William M. Wood, Deceased, *v.* Commissioner of Internal Revenue. Docket No. 6508.

MADAM: Reference is made to the oral request of March 25th of Mr. Key for data regarding the practice followed by the Bureau in making assessments in cases where, by agreement between the parties the tax laid upon the income actually received by one of them has been paid by another, which data is for use in connection with the preparation of a brief to be filed in the Supreme Court in the above case.

A careful examination of the Bureau's records shows that it has been the uniform practice to treat taxes paid under the foregoing circumstances as income to the taxpayer whose liability has thus been discharged. The earliest published ruling on this question was dated December 17, 1917, and designated as Treasury Decision 2620 (19 Treasury Decisions, 411). This ruling was the decision of the Circuit Court of Appeals for the First Circuit in the case of *West End Street Railway Company* v. *John F. Malley, Collector,* 246 Fed. 625, certiorari denied, 246 U. S. 671.

In the *West End Street Railway Company case* the Court held that dividends paid by a lessee corporation directly to the stockholders of the lessor corporation, constituted income to the lessor under the Revenue Act of October 3, 1913. The principle laid down by this Court decision was carried into Regulations 33 (revised), promulgated January 2, 1918, as Article 102, which reads as follows:

> ART. 102. *Leased properties.*—When a corporation shall have leased its property in consideration that the lessee shall pay in lieu of rental an amount equivalent to a certain rate of dividends on its capital stock or the interest on its outstanding indebtedness, together with taxes, insurance, or other fixed charges, such payments shall be considered rental payments and shall be returned by the lessor corporation as income, notwithstanding the fact that the dividends and interest are paid by the lessee direct to the stockholders and bondholders of the lessor. The lessee, in making these payments direct to the bondholders and the stockholders, does so as the agent of the lessor, and the latter is none the less liable to return the amounts thus paid as income and to pay any tax that may be due thereon. (T. D. 2620.)

Article 102 of Regulations 33 has been substantially embodied in all subsequent regulations as Article 546 of Regulations 45, Article 547 of Regulations 62, 65, and 69, and Article 70 of Regulations 74, promulgated under the Revenue Acts of 1918, 1921, 1924, 1926, and 1928, respectively.

Article 109 of Regulations 45, promulgated January 28, 1921, reads as follows:

> * * * Taxes paid by a tenant to or for a landlord for business property are additional rent and constitute a deductible item to the tenant and taxable income to the landlord, the amount of the tax being deductible by the latter.

This provision is also found in Article 109 of Regulations 62, Article 110 of Regulations 65 and 69, and Article 130 of Regulations 74.

In addition to the foregoing general provisions a specific ruling on this question was published in May, 1920, as A. R. M., 16, C. B. 2, page 62. The facts in that case were as follows: A contract was entered into in July, 1917, between the P Company and the M Company whereby the latter agreed to sell certain goods on a cost-plus basis. It was provided that the P Company should pay Federal taxes assessed on the profits accrued from this contract to the M Company. Performance under the contract was made by the M Company during 1918. In October, 1918, the P Company closed its books upon an accrual basis and made no provision for any taxes arising out of the contract. It was there held that the amount of taxes of the M Company paid by the P Company was income to the M Company for the year for which such payment was made. This ruling was followed not only in the case in which rendered, but also as a precedent in all other similar cases.

Not a single instance has been found where the Bureau has departed from this general practice of construing taxes paid under the present circum-

stances to be income to the taxpayer whose tax liability has been discharged in such a manner.

While the general principle was well established, prior to 1923 there was a lack of uniformity in the method of application. The records of the Bureau show that in some cases only the amount of the original tax paid by another was added to the taxpayer's gross income. In other cases, the amount of the additional tax paid by another was in turn added to the taxpayer's gross income. In certain cases only the amount of the original tax was added in computing the excess-profits tax while the amount of the additional tax was in turn added in computing income taxes.

This varying treatment was due to the fact that no settled policy had been adopted for the Bureau as a whole. However, on April 30, 1923, general instructions were issued to all branches of the Bureau in Confidential Memorandum A. R. R. No. 3181, the pertinent portion of which reads as follows:

> The first two questions here presented were previously submitted to the Committee by the Unit with a request for advice as to whether or not the lessor corporation should include in its net income Federal Income and profits taxes payable by the lessee corporation and, if so, as to the correct method to be followed in computing such taxes. The Committee, at that time, thoroughly considered both questions and in A. R. M. 188 (dated October 10, 1922, unpublished) advised the Unit that such taxes were additional income to the lessor, and prescribed the method to be followed in computing such taxes, as follows:

"The lessor corporation at the close of its taxable year should without taking into account the amount of income and profits taxes paid in its behalf by the lessee corporation, determine what its gross income and net income are, then compute the amount of income and profits taxes properly assessable against a similar amount of income, accrue upon its books additional gross income in an amount equal to the taxes so computed and include such an amount in its return as additional gross income. The amount of income and profits taxes assessable against the lessor corporation is to be computed on the amount of net income shown in that return."

It was the purpose of these instructions to establish a consistent policy. If they have not been followed in individual cases, it is due to an unauthorized departure from the Bureau's instructions. It is, of course, true that there are cases still pending in the courts where the audit was made prior to the issuance of these instructions and where there has been no occasion for a reaudit since. Some of those cases may exhibit the same lack of uniformity which admittedly existed prior to the issuance of the general instructions above referred to.

It should be added that neither before nor since 1923 has any algebraic formula been used by the Bureau in computing the taxes.

Respectfully,

D. H. BLAIR, *Commissioner.*

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 130

OLD COLONY TRUST COMPANY, ET AL., EXECUTORS,

v.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE COMMITTEE ON FEDERAL TAXATION OF THE AMERICAN BAR ASSOCIATION AS AMICI CURIAE.

I.—AUTHORITY FOR SUBMISSION

This brief is filed by virtue of the authority granted by the Chief Justice in the letter to one of the submitting counsel dated January 22, 1929.

II.—THE QUESTION PRESENTED

This case comes to this Court from the United States Circuit Court of Appeals for the First Circuit upon certificate under section 239 of the Judicial Code.

This certificate reads in part: "This is a petition

to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. The Board of Tax Appeals found a deficiency in the Federal income tax of Mr. Wood in the year 1919 of $708,781.93, and for the year 1920 $350,837.14. The petition for review was duly filed pursuant to sections 1001 and 1002 of the Revenue Act of 1926 and rule 38 of this Court."

We are informed that upon oral argument of this case a doubt was expressed by certain members of this Court as to whether or not the provisions of the controlling statute permitting a review of a decision of the United States Board of Tax Appeals by the Circuit Courts of Appeals and this Court, are within the provisions of the Constitution, particularly section 2 of Article III.

III.—STATUTES INVOLVED

The pertinent portions of the Revenue Acts presumably are set forth in the supplemental briefs filed by the Solicitor General and by the attorney for the plaintiff.

IV.—PRELIMINARY STATEMENT

The creation of the United States Board of Tax Appeals by the Revenue Act of 1924 afforded an instrument furthering definiteness and certainty in the interpretation of the major Federal internal revenue laws. As an agency separate from the Treasury Department and the Bureau of Internal

Revenue, the Board was declared to have rendered decisions uninfluenced by administrative expediency and marked by independence of judgment. The Board assured the taxpayer a fair and open trial *before* his case was judged. (Hearings before the Committee on Ways and Means, House of Representatives, entitled Revenue Revision, 1925, p. 904.)

By the time the Revenue Act of 1926 was under consideration by the Congress, however, opportunity had been given to observe the working of those provisions of the Revenue Act of 1924 (§§ 274(b), 279(b), 308(b), 312(b) and 900(g)) with respect to the review proceedings in the Federal district courts which might follow a decision of the Board of Tax Appeals. The procedure whereby a taxpayer tried his case in a formal manner before the Board of Tax Appeals and then if unsuccessful paid the tax there determined and brought suit for refund before a Federal district court or the Court of Claims, was found to involve unnecessary duplication and expense. For the Commissioner of Internal Revenue, if unsuccessful before the Board of Tax Appeals, to try the case anew in the Federal district courts and to carry in such proceeding the burden of proof made an adequate review of the decision of the Board of Tax Appeals an arduous task for the Government. For either party the necessity of trying the matter all over again

seemed to be a step backward in a proceeding that should be determined as quickly as possible. Such a system was wasteful of time and unnecessarily expensive to the litigants. The district courts could not be expected to have the intimate knowledge of the taxing statutes possessed by the specialists on the Board of Tax Appeals.

The American Bar Association's Committee, which was the predecessor of the compilers of this brief, in company with representatives of the Treasury Department and others interested in prompt, orderly and just procedure for the collection of the Federal taxes, appeared before the Committees of Congress having the revenue bill of 1926 in charge. (Hearings before the Committee on Ways and Means, House of Representatives, entitled Revenue Revision, 1925, pp. 849-945.) The representatives of our Association urged a provision for a direct review of the Board's decisions by the Circuit Courts of Appeals. By such a procedure waste and delay would be minimized. The balancing judgment of tribunals more generally experienced than the Board of Tax Appeals would be more quickly applied to doubtful decisions of the Board. The ultimate decisions of this Court could be sooner reached in those cases which merited the attention of this Court.

The direct review by the Circuit Courts of Appeals, or the Court of Appeals of the District of Columbia, was provided for in the Revenue Act of

1926. (§§1001-1003.) Since the approval of that Act, petitions for review of 394 decisions of the Board of Tax Appeals have been filed. One hundred of these cases have been decided. The consequences of declaring invalid the laws under which these proceedings have been carried are indeed serious. Varying limitations will have run against the Government and taxpayer alike barring alternative relief. In the end, injustice and confusion must result.

Many members of our profession have appeared or are participating in the review proceedings as judges or as counsel. There is a general feeling that at last we have an orderly and logical procedure in the determination of tax disputes, which affords an adequate method of trial and final decision with reasonable promptness. Results are satisfactory. There have been no serious proposals for legislative changes. We present this brief with the hope that this Court will find it unnecessary to declare unconstitutional the statutory provisions which are producing sound practical results.

V.—EXPLANATION OF THE PART OF THE BOARD OF TAX APPEALS IN THE REVENUE COLLECTION SYSTEM

In order that the nature of the functions of the Board of Tax Appeals under present law, and of the courts in reviewing the decisions of the Board, may be presented accurately, it seems appropriate to outline the methods of collecting additional

taxes and the development of the statutory provisions involved. Effort is made to avoid lengthy quotations from or paraphrasing of the statutes, and in lieu thereof, to outline their legal effect.

(*a*) *Prior to enactment of Revenue Act of 1924*

Prior to the enactment of the Revenue Act of 1924, the method of collecting additional taxes, under the various income and profits tax Acts, was founded upon the recognized principle that the necessities of the Government justified an insistence upon prompt payment of the amount asserted by the administrative officer. A dispute over the amount due was not permitted to postpone payment. All controversies would be determined after payment, and necessary adjustments then made. A suit for refund could be instituted if the controversy were not settled administratively. An injunction to prevent collection, however, would not lie. (R. S., § 3224; see, for example, *Graham v. du Pont* (1923), 262 U. S. 234.) Judicial review of the administrative decision could be obtained only *after* payment.

(*b*) *Under the Revenue Act of 1924*

The "payment first" principle outlined above was probably reasonably satisfactory under tax laws imposing low rates. With the war, however, came the war revenue Acts imposing tremendous tax burdens and involving exceptionally complicated questions of law and fact. Bankruptcy, or

at least serious financial embarrassment, frequently followed compliance with an administrative demand for additional taxes. It was important and most desirable that there be some method by which the taxpayer could obtain an impartial determination of his tax liability, by a tribunal independent of the Treasury Department, *before* he should be compelled to pay an additional assessment. At the same time it was important that this method should not seriously interfere with the revenue needs of the Government. Accordingly, Congress in the Revenue Act of 1924 made important exceptions in the "payment first" principle. The following outlines the normal procedure under the 1924 Act (omitting unnecessary details of Bureau procedure).

(1) The taxpayer filed his return and paid the amount he computed as due;

(2) The Commissioner of Internal Revenue examined the return and determined the amount he considered as due;

(3) If the Commissioner, after conferences with the taxpayer and examinations, finally decided that an additional amount was due, he mailed the taxpayer a so-called "deficiency letter," setting out this fact;

(4) The taxpayer could then pay the amount and, if dissatisfied, file a claim for refund and, if necessary, bring suit for refund, or, at his option—

(5) The taxpayer could file a so-called "ap-

peal" with the Board of Tax Appeals, asking it to redetermine the amount due;

(6) In the latter case the Board would hear *de novo* evidence introduced by the taxpayer and by the Commissioner under prescribed rules of evidence, hear their arguments, consider their briefs, and reach an independent determination of the taxpayer's tax liability upon the entirely new record so made;

(7) If the Board determined that an additional amount was due, the taxpayer was then compelled to pay; or, if the Board determined that an additional amount was not due, the Commissioner was prohibited from collecting by the usual process of distraint;

(8) If the taxpayer was dissatisfied with the Board's determination, he could, after payment, bring suit for refund and obtain a judicial determination of his tax liability; or, if the Commissioner was dissatisfied, he could bring suit against the taxpayer. In either event, the suit in court was a *de novo* proceeding, in which the findings of fact of the Board were given *prima facie* effect only.

(*c*) *Under the Revenue Act of 1926*

As heretofore stated, two years' experience under the 1924 Act procedure proved that much time and money were wasted. After very thorough study, it was recommended that an oppor-

tunity be given for a final *court* determination of the tax liability *before* payment, if desired. Naturally, the method of obtaining the judicial review should be direct and effective.

The procedure adopted by the 1926 Act follows in general that outlined under the 1924 Act through paragraph (6), above—that is, until the decision of the Board of Tax Appeals. The judicial character of the record made in the Board is further confirmed by the requirement that the "rules of evidence applicable in courts of equity in the District of Columbia" shall be observed. (Revenue Act of 1926, §907 (b)). For purposes of convenient comparison, we will proceed with paragraph (7):

(7) Either the taxpayer or the Commissioner (or both) may obtain an immediate judicial review of the decision of the Board by filing a "petition for . . . review," in accordance with the rules of court. (Revenue Act of 1926, § 1001(a) and (b));

(8) The Board's decision may thereupon be reviewed by the appropriate Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, adequate provisions being made for the selection of the proper court. (Revenue Act of 1926, § 1002);

(9) The decision of the Court is subject to review by this Court in accordance with section 239

or 240 of the Judicial Code. (Revenue Act of 1926, § 1003(a));

(10) Upon review, the courts have power to affirm the decision of the Board or "if the decision of the Board is not in accordance with law" to modify or reverse it, with or without remanding the case for a rehearing. (Revenue Act of 1926, § 1003(b));

(11) The above method is the "exclusive" method of reviewing the decisions of the Board, and the judgment of the court is "final." (Revenue Act of 1926, § 1003(a));

(12) If it is finally determined that an additional amount is due, it is the specific, statutory duty of the Commissioner to enforce the collection of this amount. (Revenue Act of 1926, § 274(b));

(13) If it is finally determined that the taxpayer has already overpaid, it is the duty of the Commissioner to refund (or apply as a credit against an amount due for another year) the amount of the overpayment, subject, of course, to the period of limitations applicable thereto. (Revenue Act of 1926, § 284(e));

(14) A taxpayer who filed his petition with the Board after the passage of the Revenue Act of 1926 and exercises his privilege of obtaining a final judicial determination of his tax liability prior to payment, as above outlined, is forever barred from obtaining a refund of payments on

that liability, either by way of an administrative allowance of a claim, by a suit against the United States, or by a suit against the collector. (Revenue Act of 1926, § 284(d)). This limitation is subject only to a single exception necessary to give effect to the statute of limitations—i.e., if the period of limitation expires after the decision of the Board becomes final and prior to the collection of the amount determined to be due, the amount so collected is to be refunded or credited. (Revenue Act of 1926, § 284(d) (3)). Paragraphs (1) and (2) of section 284(d) merely afford judicial process, if necessary, to compel compliance with the decision of the Board. It is believed that this exception does not affect the legal finality of the decision of the Circuit Court of Appeals or of this Court upon a review of a decision of the Board of Tax Appeals.

The above outline presents the chronological steps, under the present law, in the collection of additional income or profits taxes. No change of importance in the present discussion was made by the Revenue Act of 1928. It is submitted that the present law provides an orderly, direct, and effective method for prompt and final determinations of tax liabilities, and that it provides a proper relief to taxpayers from the harsh results of a rigid application of the "payment first" principle.

(d) Effect of 1926 Act upon pending petitions

It is believed that a discussion of the effect of the provisions of the 1926 Act would be incomplete if its effect upon petitions pending at the time that Act became law were not explained. There were a large number of appeals which had been filed with the Board under the 1924 Act procedure and which had not been disposed of at the time of the enactment of the 1926 Act. It was necessary, of course, to provide for their disposition.

Because of the fact that the record in the Board proceeding had not been made with a view to a direct review, the 1926 Act provided that the future procedure in those cases in which the hearing had been had by the Board *before* the enactment of that Act should be the same as the procedure under the 1924 Act. (Revenue Act of 1926, § 283(j)). These cases, accordingly, are not involved in the present discussion.

As to the cases in which the petition was filed prior to the 1926 Act but which came on for hearing *after* the enactment of that Act, it was provided that the new method of judicial review should be applicable. (Revenue Act of 1926, § 283(b)). From the point of view of the Government, these cases, accordingly, are in exactly the same status as cases in which the petition is filed after the 1926 Act. In other words, the Government, in order to obtain a judicial review of

the Board's decision, must follow the direct method prescribed by the 1926 Act, and the final decision of the Board in such cases is absolutely binding upon it. The position of the taxpayer is also exactly the same with but one exception: It is specifically provided that the statutory prohibition upon an administrative or judicial refund is not applicable. (Revenue Act of 1926, §§ 283(b) and 284(d) (1)).

A determination of the legal position of a taxpayer who petitions for a direct review, however, requires a more detailed analysis. The statute merely *excepts* him from the specific *prohibition* upon a claim or suit for refund. Does it follow that the decision of the Circuit Court of Appeals, or of this Court, is not final and binding upon him? Can the Commissioner, notwithstanding the court decision, nevertheless allow his claim for refund? Or, if the Commissioner rejects his claim, may he then maintain a suit for a refund? It is submitted that the court's decision is just as final and binding as a decision of this Court, for example, in a suit for refund duly instituted prior to any statutory change in the procedure.

Before attempting to discuss the legal situation, it seems appropriate to point out the practical situation with which Congress was confronted. Taxpayer, had filed appeals with the Board at a time when the only legal effect of the action of the Board, insofar as a subsequent judicial review was

concerned, was that its findings of fact were merely *prima facie*. The 1926 Act afforded taxpayers an option to pay and bring suit for refund, or to petition the Board and obtain a final judicial determination before payment. Obviously, it would not have been fair to deprive the taxpayer who had filed his petition under the 1924 Act of his right to a suit for refund. It would seem that the *primary purpose* of the statutory provisions was to permit a taxpayer in this class to exercise his option *after* the decision of the Board—that is, permit him to determine then whether he preferred to pay the tax and attempt to obtain a refund in the ordinary course, or whether he preferred to obtain a judicial determination of his tax liability which would be as final and binding upon him as any other court decision.

In the first place, argument is not required to show that the Commissioner would not be authorized to allow his claim for refund. The Commissioner may refund or credit only in the case of an overpayment. (Revenue Act of 1926, § 284(a); a corresponding provision being found in the Revenue Act of 1924, § 281(a)). A payment in accordance with a final court decision could hardly be considered an "overpayment."

In the second place, section 1003(a) of the Revenue Act of 1926 provides that the judgments of the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia on review of

decisions of the Board "shall be *final*," except that they shall be subject to review by this Court. This means that such judgments are final under the ordinary principles of *res adjudicata*. The statute thus contemplates that any suit for refund based upon the same cause of action, involving the same parties, and involving the same issues which were raised or might have been raised, in the proceedings before the Board, is barred. (*Cromwell* v. *County of Sac* (1876), 94 U. S. 351; *Trozell* v. *Del. Lack. & West. R. R.* (1913), 227 U. S. 434; *United Shoe Mach. Co.* v. *United States* (1922), 258 U. S. 451. On the other hand, Congress apparently recognized that suits for refund might be brought which would be based upon a different cause of action or involve issues which could not have been raised before the Board, or between different parties. Such suits under the ordinary principles of *res adjudicata* would not be barred. *Sage* v. *United States* (1919), 250 U. S. 33; *Smietanka* v. *Indiana Steel Co.* (1921), 257 U. S. 1.) It would seem that a *secondary purpose* of the statutory provisions under discussion was to preserve the right to sue for refund in this latter type of case. There can scarcely be imputed to the Congress an intent to provide that a judgment in one suit should be final and at the same time authorize another suit between the same parties, based upon the same cause of action, and involving issues which were or might have been raised in the other

suit; particularly if such a provision would be repugnant to the Constitution and if the statute is susceptible of a reasonable construction which will avoid such a result.

VI.—ARGUMENT

Review of decisions of the Board of Tax Appeals is, as heretofore set forth, obtained by petition for review to the Circuit Courts of Appeals and the District of Columbia Court of Appeals (Revenue Act of 1926, §§ 1001 and 1003), with further review by this Court upon certificate or certiorari (Revenue Act of 1926, § 1003). It is, of course, elementary that this Court and the Circuit Courts of Appeals, as constitutional courts, are confined to the exercise of judicial power as derived from Article III of the Constitution. The exercise of the power to review decisions of the Board of Tax Appeals, it is submitted, is an exercise of such judicial power.

1. THE REVIEW PROCEEDINGS PRESENT A CASE OR CONTROVERSY IN THE CONSTITUTIONAL SENSE

A case or controversy to which the judicial power derived from Article III of the Constitution may extend, is present in the review proceedings for the reason that—

(*a*) *The parties are adverse in interest, there are actual controversies present and no attempt to secure an abstract determination or determination*

of a moot question, and the claims of litigants are presented in such regular proceedings as are established for the protection and enforcement of rights and for the prevention and redress of wrongs.

As applied to the present case, these propositions seem so obvious as to require no more than their statement.

(*b*) *The judgments are final and binding upon and enforceable against the parties.*

As heretofore pointed out in connection with the discussion of the part played by the Board of Tax Appeals in the reven system, the judgments of the Circuit Courts of Appeals and of the District of Columbia Court of Appeals upon the review of the decisions of the Board of Tax Appeals are final, for the Revenue Act of 1926 specifies that such judgments shall be final except that review by this Court may be obtained. Furthermore, the jurisdiction of the Circuit Courts of Appeals, the District of Columbia Court of Appeals and this Court is declared to be exclusive. (Revenue Act of 1926, § 1003). Again, the Revenue Act of 1926 (§ 284(d)) provides, with one exception not pertinent to the present discussion, that the taxpayer is barred from instituting suit in any court for recovery of a tax paid in pursuance of a decision of the Board of Tax Appeals. (The finality of the exceptional class of cases in

which a petition was filed with the Board of Tax Appeals prior to the passage of the Revenue Act of 1926 but decision reached thereafter, and the application of the doctrine of *res adjudicata* in connection therewith, has previously been discussed in this brief.)

The judgments of the Circuit Courts of Appeals, the District of Columbia Court of Appeals, and this Court upon review of decisions of the Board of Tax Appeals are binding upon and enforceable against the parties. In case judgment is rendered against the Commissioner, he is barred from collecting the deficiency asserted. In case judgment is rendered for the Commissioner, he is required to proceed to collect the amount of the deficiency by assessment and distraint or otherwise. (Revenue Act of 1926, § 274(b)). It is true that the judgment of the Board does not require the award of process of execution (that is, process of the Board or the Courts) to carry it into effect, but such process is not an indispensable adjunct to an exercise of judicial power. *Fidelity National Bank* v. *Swope* (1927), 274 U. S. 123, 132; *Tutun* v. *United States* (1926), 270 U. S. 568, 576-7; *La Abra Silver Mining Co.* v. *United States* (1899), 175 U. S. 423.

The case at Bar should be carefully distinguished from the situation presented in *Gordon* v. *United States* (1864), 117 U. S. 697; *United*

States v. *Ferreira* (1851), 13 How. 40; and *In re Sanborn* (1893), 148 U. S. 222. In those cases the judgment of the court was subject to revision by an executive officer and the enforcement of the court's judgment was subject to the discretion of the executive officer. In the case now before the Court, the executive officer can not revise the final decision, or execute it at his pleasure. It is his specific duty to execute the judgment.

The cases of *Gordon* v. *United States* and *In re Sanborn*, referred to in the preceding paragraph, were expressly distinguished in the *La Abra Silver Mining Company* case (175 U. S. 423, 456-7). The *La Abra Silver Mining Company* case was one in which this Court took jurisdiction under a statute in which its judgment was executed not by court process, but solely by mandatory executive action. The case involved the Act of December 28, 1892 (27 Stat. 409), under which the Attorney General was directed to bring suit in the Court of Claims against a mining company, to determine whether an award by a United States and Mexican Mixed Commission in respect of a claim by the company against Mexico, was obtained by fraud on the part of the company. If the court determined fraud was present, the President was authorized to return such money to Mexico. If the court determined that fraud was not present, the Secretary of State was directed to distribute the money to the company.

In this *La Abra Silver Mining Company* case it was held that the determination made by the Court of Claims under the above statute was a final and conclusive determination, and not merely ancillary or advisory, that the result of the affirmation by the Supreme Court of the decision of the Court of Claims would be that the mining company was barred from all claims on account of the award of the Commission, and that the result of a reversal of the decision of the Court of Claims by the Supreme Court would be that it then became the absolute duty of the State Department to distribute the money to the company. The case presents a situation in which a judgment was not enforceable by execution of the tribunal rendering the decision and yet the power exercised was judicial power and the decision could be reviewed by a constitutional court.

The effect of the judgment was merely to give rise to the contingency upon which there came into operation one or the other of two statutory duties imposed upon Government officers, namely, to distribute or not distribute particular funds. For the carrying out of its decision the court was required to rely upon the performance by an executive officer of his statutory duty. This is the same situation as presented by the dependence of the Board of Tax Appeals upon the Commissioner of Internal Revenue for the performance of his statutory duty in carrying out the judgment of the

Board. In this respect then we are entitled to consider the final decisions of the Board of Tax Appeals resulting from the decisions of the Circuit Courts of Appeals as meeting the requirement of a "case or controversy."

2. THE REVIEW PROCEEDINGS ARE NOT ADMINISTRATIVE IN CHARACTER

Doubt as to whether the review of the determination of an administrative tribunal is in itself an administrative determination and not an exercise of judicial power may exist. Any such doubt would seem, however, to be based upon the assumption that review proceedings partake of the nature of the original proceedings. It is submitted that this is a false assumption. The question is, does the action required of the courts upon review permit only of the exercise of judicial power derived from Article III of the Constitution.

A statutory method for the review of an administrative determination merely prescribes the *procedure* by which the judicial review required by the Constitution or deemed advisable by the legislature (to the extent permitted by the Constitution) is obtained. If no method were prescribed by statute, the necessary review would be obtained by an original proceeding *de novo*, such as a suit at common law, one of the extraordinary legal remedies, or a proceeding in equity. It is quite immaterial what method is to be followed, *so long*

as a case or controversy is presented to the courts requiring or permitting only the exercise of judicial powers.

Familiar examples in Federal administrative law of statutory methods of review are found in the Federal Trade Commission Act, the Packers' and Stockyards Act, and the collection of customs revenues, each of which is outlined hereinafter. In the absence of a direct method prescribed by statute, the Federal courts, for example, review by injunction proceedings the rate-making decisions of the Interstate Commerce Commission; by mandamus, the refusal of the Commissioner of Internal Revenue to certify for payment an amount due; by habeas corpus, the decisions of the Secretary of Labor in immigration proceedings; by suit for damages, the reparation awards of the Interstate Commerce Commission. It is not believed necessary to enter into an extended discussion of this question. The constitutional propriety of the courts taking jurisdiction to review such administrative actions is now unquestioned. The reason for this lies in the fact that the review proceedings are so confined as to present for the determination of the courts only cases or controversies permitting the exercise of judicial powers. They do not, as in *Keller* v. *Potomac Electric Co.* (1923), 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.* (1927), 272 U. S. 693; and *Williamsport Wire Rope Co.* v. *United States* (1928), 277 U. S.

551, require the revision by the courts of an administrative discretion exercised by the executive or administrative officer or agency.

Furthermore, in this case, the decision reviewed (although a decision of an independent tribunal in the executive branch of the Government) is a decision judicial in character. *Blair* v. *Oesterlein Machine Co.* (1927), 275 U. S. 220, 226-7; H. Rept. 1, 69th Cong., p. 20; H. Rept. 2, 70th Cong., pp. 30-31; S. Rept. 960, 70th Cong., p. 38. Decisions of the Board of Tax Appeals declare liabilities as they stand on present or past facts under law supposed already to exist and are the basis for the enforcement of such liabilities. The decisions are, therefore, judicial in their nature. *Prentis* v. *Atlantic Coast Line Co.* (1908), 211 U. S. 210, 226. The record of proceedings therein is in form the same as a court record; no evidence becomes a part of the record (unless by stipulation) without being offered by one party during the trial, with an opportunity afforded to the other party to test its legal admissibility by the same method as is used in court. Decisions of the Board of Tax Appeals are obviously not legislative in character. Neither are they, as in the case of reparation awards of the Interstate Commerce Commission or the determinations of the Federal Trade Commission, non-binding and unenforceable (save by virtue of subsequent judicial proceedings) and therefore merely quasi-judicial in character. On

the contrary, decisions of the Board of Tax Appeals that have become final are, as hereinbefore set forth, binding and enforceable without resort to the courts. The proceedings before the Board are, as has been said by this Court and by the Congress, judicial in character. In consequence, even upon the assumption that the review proceedings partake of the nature of the original proceedings below, it is submitted that the review proceedings do not attempt to impose non-judicial functions upon constitutional courts.

Incidentally, while the decisions of the Board of Tax Appeals are judicial in character, the judicial power exercised is, of course, not that drawn from Article III of the Constitution. Territorial courts, District of Columbia courts, and special tribunals created to determine judicial questions arising between the United States as a sovereign government and private individuals, with reference to the exercise of sovereign powers in connection with governmental revenue, grants, debts, military forces, duties towards Indian tribes, and the like, exercise judicial powers drawn from sources other than Article III of the Constitution. *American Insurance Co.* v. *Canter* (1828), 1 Pet. 511, 546; *United States* v. *Ferreira* (1851), 13 How. 40, 48; *Dynes* v. *Hoover* (1858), 20 How. 65, 79; *Reynolds* v. *United States* (1878), 98 U. S. 145, 154; *The City of Panama* (1879), 101 U. S. 453, 460; *United States* v. *Winona & St. P. R. Co.*

(C. C. A. 8th, 1895), 67 Fed. 948, 955; *In re Jessie's Heirs* (D. C. Okla., 1919), 259 Fed. 694, 699; *United States* v. *McDonald* (1920), 265 Fed. 754, 759-60. Of most persuasive importance in this connection is the opinion in volume 68 of the Congressional Record on page 3181.

In the case of the Board of Tax Appeals, its powers are drawn from the authority to create and empower tribunals in connection with the exercise of the sovereign power of laying and collecting taxes, and, if deemed necessary, such additional Congressional authority as is found in the power of Congress under Article I, section 8, paragraph 9, of the Constitution to create tribunals inferior to the Supreme Court, or under Article I, section 8, paragraph 18, of the Constitution to make all laws necessary and proper to carry into execution the specific powers of Congress.

The territorial courts, District of Columbia courts, and special tribunals, such as those above described, may be vested with non-judicial powers as well as powers judicial in character. *Gordon* v. *United States* (1864), 117 U. S. 697; *In re Sanborn* (1893), 148 U. S. 222; *Keller* v. *Potomac Electric Co.* (1923), 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.* (1927), 272 U. S. 693; 68 Cong. Rec. 3181-2.

In the case of the Board of Tax Appeals, these powers non-judicial in character are illustrated

by the Board's power to revise the discretion exercised by the Commissioner of Internal Revenue in matters of special assessments. *Blair* v. *Osterlein Machine Co.* (1927), 275 U. S. 220; *Williamsport Wire Rope Co.* v. *United States* (1928), 277 U. S. 551. Even in these matters it may well be that a decision of the Board is reviewable by the courts in order to correct arbitrary action of the Board or errors of law, for example. However, such a decision is not involved in the instant case, and the extent to which such a decision may be reviewed may properly be determined when a case involving the question is presented.

The fact that the Congress was fully appreciative of the problems involved is revealed in the Committee Reports. In the report of the Committee on Finance of the United States Senate upon the Revenue Act of 1926 (S. Rep. No. 52, 69th Cong., pp. 36-7), the Committee said:

> *Court review—Questions of fact and law.*—The procedure for review of determinations of the board is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the Packers and

Stockyards Act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of section 1003 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 of the revenue act of 1924 as amended in the pending bill and subdivision (b) of section 1003 of the pending bill). The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy such as injunc-

tion, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

The principles discussed in the preceding paragraph are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, as in the importation of merchandise and the admission of aliens. In adhering to such principles the committee is of the opinion that it is establishing an appellate procedure that is unquestionably constitutional.

> Jury trial need not be granted in the proposed procedure for the reason that the proceeding is not one at common law within the meaning of the provisions of the Constitution. It is of course true in addition that the taxpayer may, by paying his tax and suing the collector for a refund instead of petitioning the board, obtain a jury trial if he desires it.

A similar statement was made in the Report of the Committe on Ways and Means of the House of Representatives upon the same Act. (H. Rept. No. 1, 69th Cong., pp. 17-21.)

3. LEGISLATIVE PRECEDENTS

(a) *Board to settle private land claims in California and Commission to the Five Civilized Tribes.*

Congress in the case of the Board of Commissioners to settle private land claims in California (9 Stat. 631, amended 10 Stat. 99) and in the case of the Commissionto the Five Civilized Tribes (29 Stat. 339) provided for direct appeals from these administrative agencies to a Federal district court (a constitutional court) and to the United States court for Indian territory (a legislative court) respectively. Appeals to the lower courts were *de novo*. In *United States* v. *Ritchie* (1855), 17 How. 525, 533, and in *Stephens* v. *Cherokee Nation* (1899), 174 U. S. 445, 477, respectively, the constitutional validity of appeals *de novo* from

these administrative agencies to the lower courts was sustained. This court, however, considered the proceedings in the lower courts as original and the term "appeals" a misnomer.

In *United States* v. *Coe* (1894), 155 U. S. 76, this Court considered the constitutionality of the provisions of the Act for the establishment of a court of private land claims (26 Stat. 854), authorizing a direct appeal to this Court, and directing this Court to retry the cause and authorizing this Court to take additional testimony therein. In the *Coe* case, as well as in the *Ritchie* case, this Court said that the tribunals in question exercised judicial power drawn from sources other than Article III of the Constitution. In the *Coe* case the Court held that the appellate procedure providing for appeals to a constitutional court (this Court), was constitutionally valid as an appellate procedure. However, in the earlier *Ritchie* case, this Court held the appeals to a constitutional court (a Federal district court) valid only as an original and not as an appellate procedure. The only obvious distinction is that the Congress designated the tribunal in the *Coe* case as a court and the tribunal in the *Ritchie* case as a board. Counsel are not aware of any substantial differences in the organization or powers of the two tribunals, and it seems difficult to believe that for constitutional purposes it is necessary that mere unsubstantial variations in Congressional nomenclature

should be considered. In any event, it must be noted that in both instances, this Court recognized the constitutional validity of the review by a constitutional court, both in matters of law and fact, of determinations of tribunals exercising judicial power flowing from sources other than Article III of the Constitution.

(b) Federal Trade Commission and Secretary of Agriculture.

Under the Federal Trade Commission Act (38 Stat. 717) cease and desist orders of the commission are not judicial in character as in the case of the decisions of the Board of Tax Appeals for the reason that the Commission enters no binding judgment but merely an order which is enforceable only on application to and adjudication by a Circuit Court of Appeals. If any person fails or neglects to obey the cease and desist order, the Commission may apply to the Circuit Court of Appeals for the enforcement of its order. On the other hand, the person to whom the order is directed may, in lieu of merely awaiting action of the Commission, petition the Circuit Court of Appeals to set aside the order. A transcript of the record of the proceeding before the commission, including testimony taken and report and order of the commission, is filed with the Circuit Court of Appeals. The Act provides that the find-

ings of the commission as to the facts, if supported by testimony, are conclusive.

The Circuit Court of Appeals has power to enter a decree affirming, modifying, or setting aside the order of the commission upon the pleadings, testimony, and proceedings set forth in the transcript. The Circuit Court of Appeals may direct additional evidence to be taken before the commission if there is shown to its satisfaction that the additional evidence is material and that there were reasonable grounds for failure to produce it in the proceeding before the commission. Section 5 of the Federal Trade Commission Act, 38 Stat. 717. Similar powers are also vested in the Interstate Commerce Commission, the Federal Reserve Board, the Federal Trade Commission under section 11 of the Clayton Act, 38 Stat. 730. While the review of proceedings is not by direct appeal, it has been referred to by this Court as appellate and advisory in character even though the functions of the Commission are characterized as merely administrative and not judicial. *The Federal Trade Commission* v. *Eastman Kodak Co.* (1927), 274 U. S. 619.

In Title II of the Packers and Stockyards Act of 1921, sections 203-5, the Congress obviously followed the Federal Trade Commission procedure, with the modification that the review the Circuit Court of Appeals would be had by direct appeal and that the provision for the conclusive-

ness of the findings, if supported by testimony, is omitted. Further, any cease and desist order of the Secretary which has become final, either as a result of a failure to appeal or after appeal, is enforceable by criminal penalty for its violation and in addition, if the courts have affirmed or modified the order, the decree of affirmation or modification operates as an injunction against the further violation of the order.

(c) The Board of General Appraisers.

By the Customs Administrative Act of 1890 (26 Stat. 136, §§ 12-18) there was created a board of nine general appraisers. Members of the Board were not appointed for a specific term and were removable by the President for such cause as he deemed sufficient. *Shurtleff* v. *United States* (1903), 189 U. S. 311. Members of the Board were to act in divisions at such ports and within such territorial limits as the Secretary of the Treasury might prescribe. All their powers and duties were to be exercised "under the general direction of the Secretary of the Treasury."

The Board had jurisdiction to examine and decide cases arising as to the dutiable value of merchandise and the decision of the Board in the case was final and conclusive and not subject to review. It was the duty of the collector of customs to ascertain, fix, and liquidate the rate and amount of duties to be paid on the merchandise and the duti-

able costs and charges thereon in accordance with the value fixed by the Board. Further, the Board had jurisdiction to examine and decide cases as to the rate and amount of duties chargeable upon imported merchandise and its decision thereon was final and conclusive except that a review thereof might be had in a Circuit Court of the United States (subsequently in a Circuit Court of Appeals of the United States) upon questions of law and fact. The procedure in such review, prescribed in § 15 is in effect the same as the procedure by which a record and decision of the Board of Tax Appeals goes to the Circuit of Appeals for review. Appeal from the Circuit Court decision might be had to the United States Supreme Court. The collector of customs was required to liquidate the entry in accordance with any such final decision.

The Board had authority to administer oaths, to cite persons to appear, and to require the production of papers. Failure to appear or to produce papers in accordance with the Board's citation or requirement constituted an offense subject to a penalty of $100, to be imposed in independent court proceedings.

Subsequently, by the Act of May 27, 1908 (35 Stat. 406), members of the Board of General Appraisers were to hold office during good behavior subject to removal by the President for cause, were invested with the powers of the Circuit

Courts of the United States in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt, and by the Tariff Act of 1909 (36 Stat. 99) were given power to establish rules of evidence, practice, and procedure. By the Tariff Act of 1913 (38 Stat. 186) the Board was authorized to exercise "both judicial and inquisitorial functions" in determining dutiable value.

In 1926 Congress changed the name of the Board to "United States Customs Court" although the immunities, tenure of office, powers, duties, rights, and privileges of the members of the Board and jurisdiction, powers, and duties of the Board were to remain the same as under existing law. 44 Stat. 669. Subsequently in the same year, in connection with the Judges Salary Bill (44 Stat. 919, 920), Congress referred to the tribunal as the Board of General Appraisers "which functions as a customs trial court."

Whether the legislation enacted in 1908 and thereafter changed the status of the Board is a disputed point. Cf., 31 Op. Atty. Gen. 577, 588; *United States v. Stone & Downer Co.* (1927), 274 U. S. 225, 232; *United States* v. *Schwartz & Co.* (1912), 3 Ct. Cust. App. 24, 32; *United States* v. *Kurtz* (1914), 5 Ct. Cust. App. 144, 146; *Fougera & Co.* v. *United States* (1919), 9 Ct. Cust. App. 284; 27 T. D. 63; 38 T. D. 712; 40 T. D. 404. The determination of that question, however, is

believed to be immaterial to the present argument.

During the period from 1890 to 1908 the status of the Board of General Appraisers was in all essentials similar to that of the Board of Tax Appeals today. In comparing the two agencies we find (1) the members of both appointed by the President for less than life terms and removable by the President in his discretion, (2) the determination of both subject to appeal to constitutional courts with the exception that determinations of the Board of General Appraisers on dutiable value are not appealable and that determinations of the Board of Tax Appeals are appealable on question of law only, (3) neither agency specifically given power to punish for contempt but compelled to resort to the courts for the enforcement of its subpœnas, (4) both agencies in the Executive Branch of the Government, though the Board of Tax Appeals is independent of the Treasury Department while the Board of General Appraisers was under the general supervision of the Secretary of the Treasury (26 Stat. 136, § 12; 21 Op. Atty. Gen. 85), and (5) both tribunals dependent upon the Treasury Department for the execution of their judgments.

The Board of General Appraisers, during the period in question, was considered by the courts as exercising judicial power. *In re Van Blankensteyn* (C. C. A. 2nd, 1892), 56 Fed. 474, 477; *Marine* v. *Lyon* (C. C. A. 4th, 1895), 65 Fed. 992,

994; *United States* v. *Lies* (1898), 170 U. S. 628, 636. During all that period no objection was raised to the validity of the legislation creating and empowering the Board and providing for the review of its determination, although numerous cases involving decisions of the Board went to the Federal courts and many of them to this Court.

Under the existing law appeals in certain cases may be taken from the Board of General Appraisers (United States Customs Court) to the United States Court of Customs Appeal and from such court to this Court by certificate for review and determination issued upon certiorari or otherwise. Judicial Code, § 195; Tariff Act of 1922, § 515. This procedure by direct appeal from the Board of General Appraisers was undoubtedly familiar to the Committee on Ways and Means and the Committee on Finance, each of which considers both internal revenue and tariff matters.

VII.—CONCLUSION

It is submitted that the procedure prescribed by the Revenue Act of 1926 for a direct and final judicial determination of tax liabilities presents a case or controversy within the meaning of the Constitution, requires of the courts the exercise of judicial powers only, and does not attempt to impose non-judicial functions upon the courts.

Respectfully submitted,

THE COMMITTEE ON FEDERAL TAXATION
OF THE AMERICAN BAR ASSOCIATION,
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(This committee acknowledges its very great indebtedness to Messrs. Ellsworth C. Alvord and Frederic P. Lee, of counsel.)

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No. 130

In the Supreme Court of the United States

OCTOBER TERM, 1928.

OLD COLONY TRUST COMPANY, ET AL, EXECUTORS,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

SUBSTITUTE BRIEF ON REARGUMENT OF THE COMMITTEE ON FEDERAL TAXATION OF THE AMERICAN BAR ASSOCIATION AS AMICI CURIAE

I—AUTHORITY FOR SUBMISSION

This substitute brief is filed by leave of court granted March 5, 1929. The brief is to be substituted for that previously filed under authority granted by the Chief Justice in his letter of January 22, 1929, to one of the submitting counsel.

II—STATEMENT OF THE CASE

The statement of facts in the certificate of the United States Circuit Court of Appeals for the First Circuit as amended in conformity with the order of this Court of February 18, 1929, reads as follows:

"Question of Law Certified by the United States Circuit Court of Appeals for the First Circuit to the Supreme Court of the United States May 2, 1928.

"This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, the Commissioner of Internal Revenue notified Mr. Wood by registered mail of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The amount of this deficiency was revised by the Commissioner's letter of August 18, 1925. On August 22, 1925, an appeal was taken to the Board of Tax Appeals. In response to an order to make petition more definite and certain, an amended petition was filed October 27, 1925. The hearing before the Board of Tax Appeals was held April 11, 1927, and the decision of the Board of Tax Appeals was rendered November 12, 1927. The Board of Tax Appeals approved the action of the Commissioner and found a deficiency in the federal income tax of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review in this Court of the decision of the Board of Tax Appeals, pursuant to the Revenue Act of 1926 and Rule 38 of this Court, was perfected December 23, 1927.

"William M. Wood was president of American Woolen Company during the years of 1918, 1919, and 1920. In 1918 he received as salary and commissions from the company $978,725, which he included in his Federal income tax return for 1918. In 1919 he received as salary and commissions from the company $548,132.87, which he included in his Federal income tax return for 1919.

"August 3, 1916, the American Woolen Company duly adopted the following resolution, which was in effect in 1919 and 1920:

> 'Voted: That this company pay any and all income taxes, State and Federal, that may hereafter become due and payable upon the salaries of all the officers of the company, including the president, William M. Wood; the comptroller, Parry C. Wiggin; the auditor, George R. Lawton; and the following members of the staff, to wit: Frank H. Carpenter, Edwin L. Heath, Samuel R. Haines, and William M. Lasbury, to the end that said persons and officers shall receive their salaries or other compensation in full without deduction on account of income taxes, State or Federal, which taxes are to be paid out of the treasury of this corporation.'

"This resolution was amended on March 25, 1918, as follows:

> 'Voted: That, referring to the vote passed by this board on August 3, 1916, in reference to income taxes, State and Federal, payable upon the salaries or compensation of the officers and certain employees of this company, the method of

computing said taxes shall be as follows, viz.:

"'"The difference between what the total amount of his tax would be, including his income from all sources, and the amount of his tax when computed upon his income excluding such compensation or salaries paid by this company."'

"Pursuant to these resolutions the American Woolen Company paid to the collector of internal revenue Mr. Wood's Federal income and surtaxes due to salary and commissions paid him by the Company as follows:

Taxes for 1918 paid in 1919	$681,169.88
Taxes for 1919 paid in 1920	351,179.27

"The decision of the Board of Tax Appeals here sought to be reviewed was that the income taxes of $681,169.88 and $351,179.27 paid by the American Woolen Company for Mr. Wood were additional income to him for the years 1919 and 1920."

Then follows the question of law certified.

III—ASSIGNMENT OF QUESTIONS FOR REARGUMENT

In its order of February 18, 1929, restoring this case to the docket for reargument, the Court requested assistance of counsel in respect of the following matters:

1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?

2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when considering appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court ques-

tions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

IV—SCOPE OF BRIEF

This brief deals solely with the jurisdictional points presented by paragraphs 1 and 2 above. It does not deal with the questions presented by paragraphs 3 and 4.

V—STATUTES INVOLVED

The pertinent portions of the Revenue Acts are set forth in Appendix A to this brief.

VI—PRELIMINARY STATEMENT

Prior to the Revenue Act of 1924 the necessity for prompt collection of Federal taxes was held to warrant the requirement of payment first with litigation postponed until after payment. No injunction would lie to prevent the collection of the amount of tax as demanded by the administrative officers. R. S. §3224. This policy when applied to the conflicting laws and huge amounts involved in the war tax legislation resulted in undue hardships. Congress, therefore, determined as a measure of relief that the taxpayer should, *before* being com-

pelled to pay any asserted deficiency in tax, be afforded an opportunity to obtain an impartial determination of his tax liability by a tribunal independent of the Treasury Department.

The simplest method of providing for such impartial determination prior to payment would have been the repeal of R. S. §3224, thereby permitting judicial review by injunction proceedings. However, the imposition upon the Federal judicial system of many thousands of tax cases (43,413 cases have been instituted before the Board of Tax Appeals to date) would either have overburdened the already heavily laden judiciary or required the creation of numerous additional judgeships. Such a course might also have produced great delay in the collection of the revenues. Congress therefore accorded the taxpayer the opportunity of impartial determination before payment by creating an agency which could settle without undue delay the large number of tax cases the decision of which depended primarily upon questions of fact rather than upon fundamental differences of law. This was accomplished by the Revenue Act of 1924 and the agency was denominated the Board of Tax Appeals.

By the time the Revenue Act of 1926 was under consideration there had been opportunity to observe the operation of those provisions of the Revenue Act of 1924 with respect to review by the Federal district courts of determinations of the Board of Tax Appeals. Under the 1924 Act the procedure required that the taxpayer unsuccessfully petitioning the Board should pay the tax determined by that body and bring suit in a Federal dis-

trict court or the Court of Claims. Under the 1924 Act also the Commissioner of Internal Revenue, if unsuccessful before the Board, was required to try the case anew in a Federal district court and therein carry the burden of proof. This process of repeating a formal trial was wasteful of time, unnecessarily expensive, and in those cases in which the Government was the loser before the Board, arduous indeed.

The American Bar Association's Committee, which was the predecessor of the compilers of this brief, in company with representatives of the Treasury Department and others interested, urged a provision for a direct review of the Board's determinations by the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia. See hearings before Committee on Ways and Means, House of Representatives, Revenue Revision 1925, pp. 849-945. Congress, cognizant of the situation, in passing the Revenue Act of 1926 provided an opportunity for direct review of the decisions of the Board of Tax Appeals upon a petition for review to the Circuit Courts of Appeals or the Court of Appeals of the District of Columbia with an opportunity to reach this Court by certiorari or certificate.

Review of 610 decisions of the Board of Tax Appeals had been sought by March 31st last. Of these 173 had been decided by that date. See Appendix B of this brief. The consequences of declaring invalid the laws under which these proceedings have been and are being prosecuted, would be serious. Varying limitations will have run against the Government and taxpayers barring alter-

native relief. Widespread confusion and injustice would seem inevitable if these proceedings have been unlawful.

There is a general feeling that at last we have an orderly and logical procedure in the determination of tax disputes, a procedure affording an adequate method of trial and final decision with reasonable promptness. There has been no serious proposal for legislative changes. Results are satisfactory.

VII—ARGUMENT

FIRST QUESTION:

WAS THERE POWER IN CONGRESS TO CONFER JURISDICTION UPON THE CIRCUIT COURTS OF APPEALS TO REVIEW ACTION BY THE BOARD OF TAX APPEALS?

IT IS SUBMITTED:

THAT CONGRESS HAS POWER TO CONFER JURISDICTION ON THE CIRCUIT COURTS OF APPEALS TO REVIEW ACTION BY THE BOARD OF TAX APPEALS.

It is believed that the validity of the legislation conferring jurisdiction upon the Circuit Courts of Appeals to review action of the Board of Tax Appeals depends upon whether such action when presented to the court for review is presented in the form of a case or controversy permitting the exercise of the judicial power within the meaning of Article III of the Constitution.

A—ELEMENTS OF A CASE OR CONTROVERSY

The requisite elements for a case or controversy, as set forth in decisions of this Court, are—

1. That the parties must be adverse in interest; that the controversy must be actual, not moot; and that the plaintiff must have a substantial interest, definite and

specific, in the question to be adjudicated. *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.* (1892), 145 U. S. 300, 301; *Fairchild* v. *Hughes* (1922), 258 U. S. 126, 129; *Massachusetts* v. *Mellon* (1923), 262 U. S. 447, 488; *New Jersey* v. *Sargent* (1926), 269 U. S. 328, 333; *Muskrat* v. *United States* (1911), 219 U. S. 346, 356; *Texas* v. *Interstate Commerce Commission* (1922), 258 U. S. 158, 162.

2. That the claims of the litigants must be presented in such regular proceedings as are established by law for the protection and enforcement of rights or the prevention or redress of wrongs. *Muskrat* v. *United States* (1911), 219 U. S. 346, 356; *Liberty Warehouse* v. *Grannis* (1927), 273 U. S. 70, 74; *Interstate Commerce Commission* v. *Brimson* (1894), 154 U. S. 447, 475, 477; *Willing* v. *Chicago Auditorium* (1928), 277 U. S. 274, 289.

3. That the judgment of the court must be final. *Gordon* v. *United States* (1864), 117 U. S. 697, 702; *United States* v. *Ferriera* (1851), 13 How. 40, 47; *In re Sanborn* (1893), 148 U. S. 222, 224.

4. That the question sought to be determined must not be administrative. *Keller* v. *Potomac Electric Co.* (1923), 261 U. S. 428, 444; *Postum Cereal Co.* v. *California Fig Nut Co.* (1927), 272 U. S. 693, 698.

B—OUTLINE OF PROCEDURE FOR REVIEW OF DECISIONS OF THE BOARD

The ascertainment of whether the above elements are present in the usual proceeding for review of action by

the Board of Tax Appeals demands preliminary consideration of the character of the procedural steps provided by law both for action by the Board and the review thereof by the courts.

1. Procedure Before the Board.

The procedure before the Board for redetermination upon petition of a taxpayer of a deficiency asserted by the Commissioner of Internal Revenue, is fully set forth in the statement made by the Chairman of the Board of Tax Appeals and incorporated in this brief as Appendix B to this brief. The Court is most earnestly requested to refer to this statement as it presents a concise authoritative account of the essential features of the Board's procedure and operations.

2. Court Rules for Review.

The procedure for review of decisions of the Board of Tax Appeals is provided for in part by specific provisions in the Revenue Act of 1926, §§1001-5, and in part by rules of the Circuit Courts of Appeals promulgated pursuant to authority granted by section 1001(b) of that Act to adopt rules for the filing of a petition for review, the preparation of the record for review, and the conduct of proceedings upon review. The essential feature of the review proceedings is that the Circuit Courts of Appeals are confined to the record made before the Board of Tax Appeals. This is readily observed from a consideration of the rules themselves which are here set out:

> "I. Every petition for review of a decision of the United States Board of Tax Appeals shall set

forth briefly the nature of the controversy, shall declare the court in which review is sought, shall contain assignments of error separately stated and numbered in respect of each and every error asserted and intended to be argued, and shall be verified by the petitioner or his attorney of record.

"II. If error is assigned in the admission or rejection of evidence, or on the ground that a finding of the Board is unsupported by any evidence, a statement of the evidence submitted to the Board shall be prepared by the petitioner. Such statement shall contain in narrative form the evidence material to the assignments of error, and shall be prepared by the parties and settled by a member of the Board in accordance with the general Equity Rules promulgated by the Supreme Court of the United States.

"III. The party applying for review shall file his petition with the clerk of the Board of Tax Appeals, and serve a copy thereof with notice of filing on the opposite party or parties. The review shall be taken by such filing and notice.

"IV. Within sixty days from such filing and notice, the statement of evidence, if any, shall be prepared and filed, and the clerk of the Board of Tax Appeals shall transmit and deliver to the Clerk of this Court copies duly certified as correct of the following documents:

1. The docket entries of proceedings before the Board.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review.

5. Statement of evidence, if any, as settled or agreed upon.

"The time for such [1] transmission and delivery of documents may be enlarged by a member of the Board or a judge of this court, and all such orders of enlargement shall forthwith be filed with the Clerk of the Board of Tax Appeals and certified copies thereof be sent to this court with the above enumerated documents.

"V. If such certified copies are not delivered to the Clerk of this Court with sixty days from said filing and notice or before the expiration of the time enlarged by order, a motion to dismiss the petition for delay may be made, and shall be granted unless good cause be shown for the delay."

See Vol. I, Digest United States Supreme Court Reports, pp. 228-9.

3. Extent of Court Review.

The character of the review permitted by the Circuit Courts of Appeals is specified in the Revenue Act of 1926, §1003(b), which provides—

> Upon such review, such courts shall have power to affirm or, *if the decision of the Board is not in accordance with law*, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. (Italics ours.)

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[1] At this point the Circuit Courts of Appeals for the First, Second, Third, and Fourth Circuits have inserted the words "preparation of evidence and".

4. Procedure of Court Upon Review

The Circuit Courts of Appeals treat decisions of the Board of Tax Appeals before them for review in the same manner as a verdict of a jury on a writ of error (*Avery* v. *Commissioner of Internal Revenue* (1927, C. C. A. 5th), 22 F. (2d) 6, 7), or the review of a law case in which the jury has been duly waived. *Conklin-Zonne-Loomis* v. *Commissioner of Internal Revenue* (1928, C. C. A. 8th), 29 F. (2d) 698, 700. The judgment of a Circuit Court of Appeals upon review of the Board's decision "shall be final" except that the judgment is subject to review upon certiorari or certificate to this Court. Revenue Act of 1926, §1003(a).

The judgment of the reviewing court and the mandate pursuant thereto are binding upon the Board and, if necessary, the Board's decision is reversed or modified to conform to such judgment and mandate. The issues in the proceeding having been determined, the ministerial duty of computing the amount of the deficiency or overpayment in accordance with the determination is performed, and final decision of the Board entered. See Rule 50 of the Rules of Practice before the United States Board of Tax Appeals, attached as a part of Appendix B of this brief.

The review procedure as above set forth is exclusive. Revenue Act of 1926, §1003(a).

C—THE REVIEW PROCEEDING PRESENTS A CASE OR CONTROVERSY BEFORE THE CIRCUIT COURT OF APPEALS

The proceedings for review of a decision of the Board of Tax Appeals present for the consideration of the Cir-

cuit Court of Appeals a case or controversy permitting the exercise of judicial power within the meaning of Article III of the Constitution.

1. Parties Actually Adverse—Substantial Interest and the Actual Controversy Are Present in the Review of Board Decisions

It is clear that the first group of the elemental requisites to a case or controversy are present in the matter now before the Court. The taxpayer and the Commissioner of Internal Revenue are adverse in their interests. The controversy is actual and not moot because the dispute is based upon existing facts, determines present rights, and is not abstract. The plaintiff has a substantial interest in the question to be adjudicated that is definite and specific. In fact, that interest will ultimately be computed in dollars and cents.

The presence of the other elements of a case or controversy, however, requires more extended consideration.

2. Claims of the Litigants are Presented in Regular Proceedings Subject to Judicial Cognizance.

The proceedings for review of decisions of the Board of Tax Appeals are established by law and rules of court pursuant thereto. They afford a remedy in some respects similar to that formerly existing when tax questions were reviewable in injunction proceedings. Under the Board of Tax Appeals procedure administrative officers are restrained from further collection of the tax pending deci-

sion by the Board of Tax Appeals and opportunity of review thereof by the Federal courts. That restraint becomes permanent unless removed by final decision of the Board conforming, if necessary, to modifications thereof by the judgment and mandate of the reviewing court.

But irrespective of any analogy, the Congress may, whenever it deems it proper, bring within the cognizance of the courts matters involving public rights, such as taxation, which are susceptible of judicial determination. The form of the proceeding lies within the Congressional discretion so long as it is one through which the judicial power is capable of acting. *Murray's Lessee* v. *Hoboken Land Improvement Company* (1855), 18 How. 272, 284. The sovereign in consenting to have its public rights adjudicated may designate the form of the proceeding and may avail itself of the national courts so long as the form of the proceeding presents an actual case or controversy susceptible of final determination by the judicial power.

3. THE JUDGMENT OF THE COURT IS FINAL.

The Judgments of the Courts are Binding upon the Parties.—"Final" is the term applied by the statute to the judgments of the courts upon review of the decisions of the Board of Tax Appeals. "Exclusive" is used to describe the jurisdiction of the courts designated to review the decisions. Revenue Act of 1926, §1003(a). These provisions apply to all classes of cases. There are no exceptions. If it is finally determined that the taxpayer

owes an additional amount to the Government, the Commissioner of Internal Revenue is under the specific statutory duty to proceed to collect the amount. If it is finally determined that no deficiency is due, the Commissioner is barred from attempting to collect. If it is finally determined that the taxpayer has made an overpayment, it is the specific statutory duty of the Commissioner to make the appropriate refund or credit. These terms must mean, among other things, that the judgments are final in the sense that the ordinary principles of *res judicata* render decisions final. The finality required by the Constitution certainly is not greater than that resulting from the application of the doctrine of *res judicata*.

Some confusion seems to have arisen as to the legal effect of sections 284(d) and 283(b) of the Revenue Act of 1926. It is submitted that an examination of these provisions will demonstrate conclusively that they do not affect the finality of the judgments.

At the time the Revenue Act of 1926 was under consideration by the Congress, questions had arisen as to the application of the doctrine of *res judicata* in tax cases. What were different causes of action—was the entire tax liability for a particular taxable period *one* cause of action, or did each of the various issues involved present a different cause of action? If a suit between the Commissioner and a taxpayer had been decided, could the taxpayer maintain a second suit upon the same issues against the United States or against a Collector of Internal Revenue? Was the doctrine that a collector and the United States were "different parties" to be continued?

These questions were definitely settled by the Congress as to the future. Section 284(d) of the Revenue Act of 1926 specifically provides that if a taxpayer, after the enactment of the 1926 Act, files a petition with the Board of Tax Appeals, then—

> no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court * * *

This specific statutory requirement that the entire tax liability for a given taxable year must be settled once and for all in the one proceeding, is not applicable to cases, such as the one now at bar, filed with the Board under the Revenue Act of 1924. The situation causing Congress to adopt this policy is obvious. There were more than 10,000 petitions pending before the Board when the Revenue Act of 1926 was enacted. Many of the petitioners also had suits, or were contemplating bringing suits, in court. Depriving petitioners of the rights accruing to them under the Revenue Act of 1924 was unwarranted. But there seemed no persuasive reason why they should not also have the newer privileges of the direct review which was accorded by the 1926 Act. Accordingly, Congress provided that a taxpayer having one of these so-called "interim" cases pending before the Board should have an option of obtaining a judicial review under the provisions of the 1924 Act, or under the 1926 Act, as he might choose.

All that section 283(b) states is that the taxpayer with an "interim" case shall not be subject to the prohibition of section 284(d) upon claims or suits for refund. It carefully avoids the grant of an affirmative right. It is negative only. Its legal effect is that the taxpayer in the case now at bar, for example, although he is absolutely bound by the decision of this court in this case, may, if the doctrine of *res judicata* permits, maintain a second suit. This does not mean that the court decision in this case lacks finality. It means only that the taxpayer has *another* cause of action.

The Judgments of the Courts are Enforcible against the Parties.—It is true that the enforcement of the judgments of the courts is dependent upon an executive officer, the Commissioner of Internal Revenue. The duty imposed upon the Commissioner, however, is not discretionary. It is his mandatory duty to enforce the judgment. The absence of process of execution (that is, process of the Board or of the courts) does not militate against the effect of the judgment and mandate of the courts and the decision of the Board pursuant thereto. This Court has repeatedly held that such process is not an indispensable adjunct to an exercise of judicial power. *Fidelity National Bank* v. *Swope* (1927, 274 U. S. 123, 132; *Tutun* v. *United States* (1926), 270 U. S. 568, 576; *La Abra Silver Mining Co.* v. *United States* (1899), 175 U. S. 423, 461.

In its report upon the Revenue Act of 1926, the Committee on Ways and Means stated (H. Rept. No. 1, 69th Cong., p. 20)—

> The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, and the performance of the duty in accordance with law is mandatory.

A similar statement was made in the report of the Committee on Finance upon the Revenue Act of 1926. S. Rept. No. 52, 69th Cong., p. 37.

The case at Bar should be carefully distinguished from the situation presented in *Gordon* v. *United States* (1864), 117 U. S. 697; *United States* v. *Ferreira* (1851), 13 How. 40; and *In re Sanborn* (1893), 148 U. S. 222. In those cases the judgment of the court was subject to revision by an executive officer and the enforcement of the court's judgment was subject to the discretion of the executive officer. In the case now before this Court the Board cannot revise the judgment or mandate of the court or execute it at their pleasure. It is their specific duty to revise their decision in accordance with the judgment and mandate as rendered and issued. Neither can the Commissioner of Internal Revenue revise the final decision of the Board or execute it at his pleasure. It is his specific duty to execute the decision as rendered.

The cases of *Gordon* v. *United States* and *In re Sanborn*, referred to in the preceding paragraph, were ex-

pressly distinguished in the *La Abra Silver Mining Co.* v. *United States* (1899), 175 U. S. 423 case. This case was one in which this Court took jurisdiction under a statute in which its judgment was executed not by court process but solely by mandatory executive action. The case involved the Act of December 28, 1892 (27 Stat. 409), under which the Attorney General was directed to bring suit in the Court of Claims against a mining company to determine whether an award by a United States and Mexican Mixed Commission in respect of a claim by the company against Mexico, was obtained by fraud on the part of the company. If the court determined fraud was present, the President was authorized to return such money to Mexico. If the court determined that fraud was not present, the Secretary of State was directed to distribute the money to the company.

In this *La Abra Silver Mining Company* case it was held that the determination made by the Court of Claims under the above statute was a final and conclusive determination, and not merely ancillary or advisory, that the result of the affirmation by the Supreme Court of the decision of the Court of Claims would be that the mining company was barred from all claims on account of the award of the Commission, and that the result of a reversal of the decision of the Court of Claims by the Supreme Court would be that it then became the absolute duty of the State Department to distribute the money to the company. The case presents a situation in which a judgment was not enforceable by execution of the tribunal rendering the decision and yet the power exercised was

judicial power and the decision could be reviewed by a constitutional court.

The effect of the judgment was merely to give rise to the contingency upon which there came into operation one or the other of two statutory duties imposed upon Government officers, namely, to distribute or not distribute particular funds. For the carrying out of its decision the court was required to rely upon the performance by an executive officer of his statutory duty. This is the same situation as is presented by the dependence of the courts upon the Board of Tax Appeals and the Commissioner of Internal Revenue for the performance of their statutory duty in carrying out the judgment and mandate of the court and decision of the Board, respectively.

It should be apparent from the foregoing that the expressed terms of the statute and the expressed intent of the committees of the Congress, establish the finality (as applicable to a constitutional case or controversy), of the judgment of the Circuit Courts of Appeals in reviewing Board actions.

4. The Matter to be Determined Is Not An Administrative Question.

Keller v. *Potomac Electric Power Co.* (1923), 261 U. S. 428, and *Postum Cereal Co.* v. *California Fig Nut Co.* (1927), 272 U. S. 693, typify cases holding invalid legislation imposing upon constitutional courts the duty of determining administrative questions.

In the former case this Court considered a provision

of the Public Utilities Act of the District of Columbia authorizing the Public Utilities Commission to institute a proceeding in equity in the Supreme Court of the District of Columbia in which the court was required to instruct the commission as to the elements of value to be considered by them in valuations of the properties of public utilities. The court was required to consider the evidence and the full record of the case and substitute its discretion for the legislative discretion of the commission. Furthermore, whenever any valuation or rate based thereon was fixed, further court proceedings *de novo* in character were afforded by the statute in which to set aside the valuation or rate.

In the *Postum Cereal Company* case the statute granted an appeal to the Court of Appeals of the District of Columbia from the decision of the Commissioner of Patents in proceedings for the cancellation of a trade mark registration. This Court held that the review was not of an exercise of judicial power but merely an administrative decision. The court upon appeal was merely instructing the Commissioner of Patents as to the exercise of his administrative function with regard to the cancellation of trade marks. The cancellation of trade marks was an administrative function for the reason that the Commissioner of Patents entered no binding judgment as to the respective rights of the parties to trade mark protection, but on the contrary, the law afforded subsequently a *de novo* court proceeding whereby, irrespective of the decision of the Commissioner of Patents, the

validity of the registration of the trade mark to the Commissioner of Patents could be called into question.

In both the above cases it will be observed that the officer or agency in the Executive branch of the Government was not exercising power judicial in character, but power legislative or administrative in character, and that the decision of the executive officer or agency was not final and did not indisputably and conclusively settle the rights of the parties. On the contrary, in the above cases affirmative provision was made for further judicial adjudication of these rights in proceedings *de novo*. While the questions in the case at bar arise upon a decision by an agency in the Executive branch of the Government, nevertheless that decision is final and does indisputably and conclusively settle the rights of the parties. The decision of the Board reviewed in the case at bar is not legislative, executive, or administrative in character, but judicial in character. The decision declares liabilities as they stand on present or past facts under law supposed already to exist, and are the basis for the enforcement of such liabilities. The decision is, therefore, judicial in its nature. *Prentis* v. *Atlantic Coast Line Co.* (1908), 211 U. S. 210, 226.

All doubt as to the nature of the functions of the Board would seem to be put at rest by this Court in the case of *Blair* v. *Oesterlein Machine Co.* (1927), 275 U. S. 220, in which it was held that the Board is exercising judicial power. In that case this Court in passing on the question whether the Board could review the action of the

Commissioner in special assessment cases said (pp. 226-27):

> But there is no inherent impossibility or, indeed, serious difficulty *in reviewing judicially* any determination authorized by §§327 and 328. The determination is to be made upon prescribed and ascertainable data and is to conform to standards set up by the statute, all defined with sufficient definiteness and clarity to be susceptible of judicial scrutiny. We can not assume that it is to be either arbitrary or unrelated to the appropriate data in the Commissioner's office, or that he is more qualified to make it than the Board established to review his decisions. *An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character.* Not only is it required by §900(e) to hear and determine appeals taken under §274, which in terms allows an appeal in every case where a deficiency is found by the Commissioner, but it is empowered to administer oaths and to compel the attendance of witnesses and the production of documents and records. It may investigate anew the issues between the government and the taxpayer and upon the determination of the appeal it may affirm, set aside or modify the findings and decision of the Commissioner. (Italics ours.)

Again, on page 227:

> * * * Neither the statute nor the practice of the Department suggests the existence of any governmental policy with respect to the use of

> the returns as evidence in any way inconsistent with the provisions of *the statute authorizing the Board of Tax Appeals to hear appeals and conduct proceedings which are judicial in character.* (Italics ours.)

Furthermore, the appropriate committees of Congress have declared it to be the intention of the legislation to establish a board whose functions were judicial in character. In discussing the procedure for review of the Board's decisions, as first provided by the Revenue Act of 1926, the Committee on Ways and Means stated in its report (H. Rept. 1, 69th Cong., p. 20) that—

> In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, and the

> performance of the duty in accordance with law is mandatory. Such review of a judicial, as distinguished from a legislative or administrative determination, may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

The same statement is made in the report of the Senate Committee on Finance, S. Rept. 52, 69th Cong., p. 37.

Again, in the report of the Committee on Ways and Means of the Revenue Act of 1928 (H. Rept. 2, 70th Cong., pp. 30-1) it is stated—

> A recent decision by the circuit court of appeals for the seventh circuit indicates that there is some disposition to regard the Board of Tax Appeals as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The committee is of the opinion that the board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure

> of the board shall, just as the Federal equity rules, have the force and effect of law.

Further, in the report of the Senate Committee on Finance upon the Revenue Act of 1928 (S. Rept. 960, 70th Cong., p. 38) it is stated—

> In view of certain expressions in a recent court opinion, the House bill in section 601 provides that no decision of the board shall be modified or reversed because the board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the board for subsequent proceedings in accordance with law, the existing provisions of law clearly contemplate judicial, not administrative, procedure on the part of the board, and the committee can see no need of further legislation on this subject. It is not the duty of the board to make investigations of tax cases but to decide the case on the basis of evidence properly placed before it by the commissioner and the taxpayer.

Board's Judicial Powers Are Not Drawn from Article III of the Constitution.—While the decisions of the Board of Tax Appeals are judicial in character, the judicial power exercised is, of course, not that drawn from Article III of the Constitution. Territorial courts, District of Columbia courts, and special tribunals created to determine judicial questions arising between the United States as a sovereign government and private individuals, with reference to the exercise of sovereign powers in connection with governmental revenue, grants, debts, mili-

tary forces, duties toward Indian tribes, and the like exercise judicial powers drawn from sources other than Article III of the Constitution. *American Insurance Co.* v. *Canter* (1828), 1 Pet. 511, 546; *United States* v. *Ferreira* (1851), 13 How. 40, 48; *Dynes* v. *Hoover* (1858), 20 How. 65, 79; *Reynolds* v. *United States* (1878), 98 U. S. 145, 154; *City of Panama* (1879), 11 Otto 453, 460; *United States* v. *Winona & St. P. R. R. Co.* (C. C. A. 8th, 1895), 67 Fed. 948, 955; *In re Jessie's Heirs* (1919, D. C. Okla.), 259 Fed. 694, 699; *United States* v. *McDonald* (1920), 265 Fed. 754, 759. Of most persuasive importance in this connection is the opinion in volume 68 of the Congressional Record on page 3181-2.

In the case of the Board of Tax Appeals, its powers are drawn from the authority to create and empower tribunals in connection with the exercise of the sovereign power of laying and collecting taxes, and, if deemed necessary, such additional Congressional authority as is found in the power of Congress under Article I, section 8, paragraph 9, of the Constitution to create tribunals inferior to the Supreme Court, or under Article 1, section 8, paragraph 18, of the Constitution to make all laws necessary and proper to carry into execution the specific powers of Congress.

The territorial courts, District of Columbia courts, and special tribunals, such as those above described, may be vested with nonjudicial powers as well as powers judicial in character. *Gordon* v. *United States* (1864), 117 U. S. 697; *In re Sanborn* (1893), 148 U. S. 222; *Keller* v. *Potomac Electric Co.* (1923), 261 U. S. 428; *Postum*

Cereal Co. v. *California Fig Nut Co.* (1927), 272 U. S. 693; 68th Cong. Rec. 3181-2.

In the case of the Board of Tax Appeals, these powers nonjudicial in character are illustrated by the Board's power to revise the discretion exercised by the Commissioner of Internal Revenue in matters of special assessments. *Blair* v. *Osterlein Machine Co.* (1927), 275 U. S. 220; *Williamsport Wire Rope Co.* v. *United States* (1928), 277 U. S. 551. Even in these matters it may well be that a decision of the Board is reviewable by the courts in order to correct arbitrary action of the Board or errors of law, for example.

Investiture of Board with Powers Judicial in Character is Constitutional.—Any objection raised against the constitutionality of investing the Board with powers judicial in character, would be based upon the theory that the investiture constitutes a violation of the doctrine of separation of powers. It is obvious that Congress is not delegating judicial power to the Board for judicial power (with certain irrelevant exceptions) is not vested in the Congress, as is the legislative power, and, therefore, judicial power can not be delegated by the Congress. The objection grounded upon the doctrine of separation of powers must, if valid at all, be found in the theory that power vested by Article III of the Constitution in the Judicial branch of the Government can not by Act of Congress be transferred to the Executive branch of the Government.

The answer to this objection is clear. The power vested in the Judicial branch of the Government by the Con-

stitution is the judicial power of the United States set forth in Article III of the Constitution. That power, it is true, can not be placed in any tribunal, save one of the constitutional courts, ordained and established by Article III or in pursuance of Act of Congress enacted thereunder. Congress has not attempted, however, to invest the Board of Tax Appeals with judicial power in the sense of Article III of the Constitution.

The judicial power placed in the Board of Tax Appeals finds its source not in Article III but in the power of Congress to collect taxes and to create tribunals in aid thereof. The doctrine of separation of powers is, therefore, not violated by the legislation creating the Board of Tax Appeals, for the judicial power of the United States found in Article III remains unimpaired and vested wholly in the constitutional courts of the United States.

On the other hand, while Congress may not transfer from the Executive branch of the Government any executive power vested in the President by Article II of the Constitution (*Myers* v. *United States* (1926), 272 U. S. 52, 119), or transfer from the Judicial branch any of the judicial power vested in the constitutional courts by Article III of the Constitution, nevertheless the Congress may avail itself of the Executive branch of the Government for the exercise of powers not executive in character. In *Hampton and Co.* v. *United States* (1928), 276 U. S. 394, 406, the Supreme Court has said:

> * * * it is a breach of the National fundamental law if Congress gives up its legislative power and

> transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches *in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch.* In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination. (Italics ours.)

Investiture of the Board of Tax Appeals with judicial power derived from sources other than Article III, is not "an assumption of the constitutional field of action" of the Judicial branch of the Government.

A pertinent example of an agency in the Executive branch of the Government that has been held to be vested with judicial power is the Board of General Appraisers, which was created by the Customs Administrative Act of 1890 (26 Stat. 131, 136, §§12-18). Members of the Board were not appointed for a specific term and were removable by the President for such cause as he deemed sufficient. (*Shurtleff* v. *United States* (1903), 189 U. S. 311, 313.) Members of the Board were to act in divisions at such ports and within such territorial limits as the Secretary of the Treasury might prescribe. All their powers and duties were to be exercised "under

the general direction of the Secretary of the Treasury."

The Board had jurisdiction to examine and decide cases arising as to the dutiable value of merchandise and the decision of the Board in the case was final and conclusive and not subject to review. It was the duty of the collector of customs to ascertain, fix, and liquidate the rate and amount of duties to be paid on the merchandise and the dutiable costs and charges thereon in accordance with the value fixed by the Board. Further, the Board had jurisdiction to examine and decide cases as to the rate and amount of duties chargeable upon imported merchandise and as to the classification of such merchandise. Its decision thereon was final and conclusive except that a review thereof might be had in a Circuit Court of the United States (subsequently in a Circuit Court of Appeals of the United States) upon questions of law and fact. The procedure in such review, prescribed in section 15, is in effect the same as the procedure by which a record and decision of the Board of Tax Appeals goes to the Circuit Court of Appeals for review. Appeal from the Circuit Court decision might be had to the United States Supreme Court. The collector of customs was required to liquidate the entry in accordance with any such final decision.

The Board had authority to administer oaths, to cite persons to appear, and to require the production of papers. Failure to appear or to produce papers in accordance with the Board's citation or requirement constituted an offense subject to a penalty of $100, to be imposed in independent court proceedings.

Subsequently, by the Act of May 27, 1908 (35 Stat. 403, 406), members of the Board of General Appraisers were to hold office during good behavior subject to removal by the President for cause, were invested with the powers of the Circuit Courts of the United States in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt, and by the Tariff Act of 1909 (36 Stat. 11, 99) were given power to establish rules of evidence, practice, and procedure. By the Tariff Act of 1913 (38 Stat. 114, 186) the Board was authorized to exercise "both judicial and inquisitorial functions" in determining dutiable value.

In 1926 Congress changed the name of the Board to "United States Customs Court" although the immunities, tenure of office, powers, duties, rights, and privileges of the members of the Board and jurisdiction, powers, and duties of the Board were to remain the same as under existing law. 44 Stat. 669. Subsequently in the same year, in connection with the Judges Salary Bill (44 Stat. 919, 920), Congress referred to the tribunal as the Board of General Appraisers "which functions as a customs trial court."

Whether the legislation enacted in 1908 and thereafter changed the status of the Board is a disputed point. Cf., 31 Op. Atty. Gen. 577; *United States* v. *Stone & Downer Co.* (1927), 274 U. S. 225, 232; *United States* v. *Schwartz & Co.* (1912), 3 Ct. Cust. App. 24, 32; *United States* v. *Kurtz* (1914), 5 Ct. Cust. App. 144, 146; *Fougera & Co.* v. *United States* (1919), 9 Ct. Cust. App. 284; 27 T. D. 63; 38 T. D. 712; 40 T. D. 404. The determi-

nation of that question, however, is believed to be immaterial to the present argument.

During the period from 1890 to 1908 the status of the Board of General Appraisers was in all essentials similar to that of the Board of Tax Appeals today. In comparing the two agencies we find (1) the members of both appointed by the President for less than life terms and removable by the President in his discretion, (2) the determinations of both subject to appeal to constitutional courts with the exception that determinations of the Board of General Appraisers on dutiable value are not appealable and that determinations of the Board of Tax Appeals are appealable on questions of law only, (3) neither agency specifically given power to punish for contempt but compelled to resort to the courts for the enforcement of its subpoenas, (4) both agencies in the Executive branch of the Government, though the Board of Tax Appeals is independent of the Treasury Department while the Board of General Appraisers was under the general supervision of the Secretary of the Treasury (26 Stat. 131, 136, §12; 21 Op. Atty. Gen. 85), and (5) both tribunals dependent upon the Treasury Department for the execution of their decisions.

The Board of General Appraisers, during the period in question, was considered by the courts as exercising judicial power. *In re Van Blankensteyn* (1892, C. C. A. 2nd), 56 Fed. 474, 477; *Marine* v. *Lyon* (1895, C. C. A. 4th), 65 Fed. 992, 994; *United States* v. *Lies* (1898), 170 U. S. 628, 636. During all that period no objection was raised to the validity of the legislation creating and em-

powering the Board and providing for the review of its decisions, although numerous cases involving decisions of the Board went to the Federal courts and many of them to this Court.

Under the existing law appeals in certain cases may be taken from the Board of General Appraisers (United States Customs Court) to the United States Court of Customs Appeals and from such court to this Court by certificate for review and determination issued upon certiorari or otherwise. Judicial Code, §195; 42 Stat. 858, 970, §515. This procedure by direct appeal from the Board of General Appraisers was undoubtedly familiar to the Committee on Ways and Means and the Committee on Finance, each of which considers both internal revenue and tariff matters.

Other pertinent examples of officers or agencies in the Executive branch of the Government that are vested with authority to make determinations judicial in character subject to direct review by a constitutional court, are the Federal Trade Commission, under section 5 of the Federal Trade Commission Act (38 Stat. 717); the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, under section 11 of the Clayton Act (38 Stat. 730); the Secretary of Agriculture under Title II of the Packers and Stockyards Act of 1921 (42 Stat. 159), and under the Grain Futures Act (42 Stat. 998).

D—THE REVIEW PROCEEDING IS NOT LACKING IN DUE PROCESS.

This Court and the Circuit Courts of Appeals are not to be deprived of jurisdiction on the ground that the statute authorizing the review proceeding is unconstitutional as lacking in due process. It is true that the procedure does not afford the taxpayer any fact-finding by a jury or court; but this is unnecessary in view of the alternative, rather than the substitutional, character of the remedy before the Board. The established suits for refund—against the collector at common law and against the United States by statute—are preserved and remain available to the taxpayer at his option. That these proceedings afford due process has never been questioned. Moreover, in customs revenue matters it has been held within the power of the Congress to deny the taxpayer the right to have a court determination upon such a question of fact as dutiable value. *Passavant* v. *United States* (1893), 148 U. S. 214. Therefore, when the taxpayer voluntarily elects to waive these remedies and go forward under the more convenient procedure before the Board, neither he nor the courts can attack such procedure as a deprivation of due process.

SECOND QUESTION:

DOES THE CIRCUIT COURT OF APPEALS ACT AS A TRIBUNAL OF ORIGINAL JURISDICTION WHEN CONSIDERING APPEALS FROM THE BOARD OF TAX APPEALS? IF SO, MAY IT UNDER TITLE 28, UNITED STATES CODE, SEC. 346, CERTIFY TO THIS COURT QUESTIONS DEEMED NECESSARY FOR THE PROPER DECISION OF A PENDING CAUSE?

IT IS SUBMITTED:

THAT THE CIRCUIT COURTS OF APPEALS MAY CERTIFY TO THIS COURT QUESTIONS DEEMED NECESSARY FOR THE PROPER DECISION OF THE PENDING CAUSE.

In view of the juxtaposition of the two parts of question 2, it is assumed that the question as to whether the Circuit Court of Appeals exercises original jurisdiction or appellate jurisdiction when considering the petitions for review from the Board of Tax Appeals, is deemed necessary of determination in order to determine whether the Circuit Court of Appeals may in any such case certify questions of law to this Court and whether such certification is constitutionally valid.

Title 28, United States Code, section 346, to which the Court refers in its questions, sets forth section 239 of the Judicial Code. Prior to the Act of February 13, 1923 (43 Stat. 938), section 239 read in part as follows—

> In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; * * *

Members of this Court prepared and submitted to the

Congress the bill which ultimately became law as the Act of February 13, 1925. The bill proposed to amend section 239 so as to read in part—

> In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; * * *

This proposed amendment was retained without change in the bill as finally enacted.

In view of the legislative history of the provision it would seem unquestionable that the power of certification by the Circuit Court of Appeals is no longer limited to cases within their appellate jurisdiction as defined in section 128 of the Judicial Code, but now extends to any case, whether original or appellate, so long as it is a constitutional case or controversy.

In an analysis prepared by Members of this Court of the bill above referred to, it is stated in part as follows—

> Section 239: The existing law confines the right of Circuit Courts of Appeals to certify questions to the Supreme Court to cases within their appellate jurisdiction as defined in section 128. *The amendment gives the right in any case in the court.* This effects no material change, however, as the appellate jurisdiction in every case in those courts will be conferred by section 128, as amended by the bill. (Italics ours)—See Hearings before a Subcommittee of the Committee on the Ju-

diciary, United States Senate, 68th Congress, 1st Session, on S. 2060, February 2, 1924, entitled "Procedure in Federal Courts," page 13.

The above statement verifies what section 239 by its very language plainly states, namely, that the right of certification exists in any case before the Circuit Courts of Appeals. There is no limitation dependent upon whether the case is original or appellate.

Of course, as stated in the analysis, the amendment to section 239 made no change in the law in force at the time. Nevertheless the amendment was potentially capable of effecting a change in case any subsequent Act of Congress should confer original jurisdiction upon the Circuit Courts of Appeals. The amendment would cover the present cause even if it were held that the jurisdiction of the Circuit Court of Appeals were original. The policy of certification from a court of original jurisdiction as expressed in section 239, as amended by section 1 of the Judges Act of 1925, conforms to the policy of section 3 of that Act, which newly granted the right of certification of questions of law to this Court from the Court of Claims. That court is one of original jurisdiction and its findings of fact are binding upon this Court in review proceedings.

This Court did not, in its order restoring the present case to its docket for reargument, require that the entire record be brought before it and no attempt has been made to certify the entire case. The Circuit Court of Appeals certified only a question of law for instruction by this Court. The review by the Circuit Court of Ap-

peals and of this Court of decisions of the Board of Tax Appeals is required by the Revenue Act of 1926, section 1003(b), to be confined to questions of law. See page — of this brief. It is respectfully submitted that when the certificate to this Court neither presents the entire record nor certifies for instruction the entire case, but only on the contrary a question of law, and that when the review of this Court is by Act of Congress confined to questions of law, this Court is not exercising original jurisdiction in reviewing the pending cause upon the certificate therein presented. In consequence, section 239 of the Judicial Code, as amended, and section 1003(a) of the Revenue Act of 1926 are not unconstitutional as conferring original jurisdiction upon this Court by authorizing and recognizing the right of certification in this and similar causes.

Counsel are of the opinion that there exists a valid right of certification by the Circuit Court of Appeals to this Court of questions of law in proceedings on petition of review from the Board of Tax Appeals before the Circuit Court of Appeals, and that while such review proceedings are appellate in character, the determination of the character of such proceedings is not necessary in order to reach a conclusion upon the right of certification.

VIII—CONCLUSION

It is respectfully submitted that the procedure prescribed by the Revenue Act of 1926 affording direct and final judicial determination of questions of law with regard to tax liability, vests in the Circuit Courts of Ap-

peals and in this Court jurisdiction upon review which is within the constitutional power of Congress to confer, and that the Circuit Courts of Appeals may validly certify to this Court questions of law necessary to a proper decision in such review proceedings.

The Committee on Federal Taxation of the American Bar Association:

ALBERT L. HOPKINS,
LOUIS A. LECHER,
ROBERT N. MILLER,
GEORGE M. MORRIS,
HUGH SATTERLEE,
MURRAY M. SHOEMAKER,
HARRY C. WEEKS.

Of Counsel:

FREDERIC P. LEE,
ELLSWORTH C. ALVORD.

APPENDIX A — STATUTES INVOLVED

1—STATUTES RELATING TO DEFICIENCY

SEC. 273. [Revenue Act of 1926]. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SEC. 274 [Revenue Act of 1926]. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sun-

day as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assumed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(d) The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency.

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered, for the purposes of this subdivision or of subdivision (a)

of this section, or of subdivsion (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

(g) The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

(h) For the purposes of this title the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1005.

* * * *

SEC. 283. [Revenue Act of 1926] (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits, tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purpose of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency

or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

(b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of sub-division (d) of section 284.

* * * *

SEC. 284 [Revenue Act of 1926] * * * (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

2—STATUTES RELATING TO ORGANIZATION AND FUNCTIONS OF BOARD OF TAX APPEALS

TITLE X—BOARD OF TAX APPEALS

SEC. 1000. [Revenue Act of 1926.] Title IX of the Revenue Act of 1924 is amended to read as follows:

"TITLE IX—BOARD OF TAX APPEALS

"MEMBERSHIP OF BOARD

"SEC. 900. The Board of Tax Appeals (hereinafter referred to as the 'Board') is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

"SEC. 901. (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each member shall receive salary at the rate of $10,000 per annum.

"(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth, four at the end of the tenth, four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years

after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

"SEC. 902. A member of the Board removed from office in accordance with subdivision (a) of section 901 shall not be permitted at any time to practice before the Board.

"ORGANIZATION AND PROCEDURE

"SEC. 903. The Board shall at least biennially designate a member to act as chairman. The Board shall have a seal which shall be judicially noticed.

"SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.

"SEC. 905. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division, respectively.

"SEC. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.[1]

"(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case

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[1] Sections 906 and 907 (a) and (b) of the Revenue Act of 1924 were amended as here set out by section 601 of the Revenue Act of 1928.

in which the chairman directs that such report shall be reviewed by the Board.

"(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.

"(d) A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

"(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax.[1]

"(f) The findings of the Board made in connection with any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such

Act, continue to be prima facie evidence of the fact therein stated.

"SEC. 907. (a) Notice and opportunity to be heard upon any proceeding instituted before the Board shall be given to the taxpayer and the Commissioner, and a report upon the proceeding and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board. If an opportunity to be heard upon the proceeding is given before a division of the Board, neither the taxpayer nor the Commissioner shall be entitled to notice and opportunity to be heard before the Board upon review, except upon a specific order of the chairman. Hearings before the Board and its divisions shall be open to the public, and the testimony, and, if the Board so requires, the argument shall be stenographically reported. The Board is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has

been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner. The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, decision, order, notice, or process.

"(b) It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.

"(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

"(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the

several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

"(e) The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board and of its divisions shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

"(f) The Secretary of the Treasury shall provide the Board with suitable rooms in courthouses or other buildings when necessary for hearings by the Board, or any division thereof, outside the District of Columbia.

"WITNESSES

"SEC. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of

hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent.

"SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

"(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

"(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

"(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926.

"EXPENDITURES AND PERSONNEL

"SEC. 910. The members of the Board shall receive necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be ap-

plicable to the Board of General Appraisers. The employees of the Board shall receive their necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, in an amount not to exceed $5 per day. The Board is authorized in accordance with the civil service laws to appoint, and in accordance with the Classification Act of 1923 to fix the compensation of, such employees, and to make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodical), as may be necessary efficiently to execute the functions vested in the Board. All expenditures of the Board shall be allowed and paid, out of any moneys appropriated for the purposes of the Board, upon presentation of itemized vouchers therefor signed by the chairman. All fees received by the Board shall be covered into the Treasury as miscellaneous receipts. Section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Board when the aggregate amount involved does not exceed the sum of $25.

"FRIVOLOUS APPEALS TO BOARD

"SEC. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon

notice and demand from the collector, and shall be collected as a part of the tax.

"TRANSFEREE PROCEEDINGS

"SEC. 912. In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.[a]

"SEC. 913. Upon application to the Board, a transferee of property of a taxpayer shall be entitled, under rules prescribed by the Board, to a preliminary examination of books, papers, documents, correspondence, and other evidence of the taxpayer or a preceding transferee of the taxpayer's property, if the transferee making the application is a petitioner before the Board for the redetermination of his liability in respect of the tax (including interest, penalties, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer. Upon such application the Board may require by subpœna, ordered by the Board or any division thereof and signed by a member, the production of all such books, papers, documents, correspondence, and other evidence within the United States the production of which, in the opinion of the Board or division thereof, is necessary to enable the transferee to ascertain the liability of the taxpayer or preceding transferee and will not result in undue hardship to the taxpayer or preceding trans-

[a] Sections 912 and 913 were added to Title IX of the Revenue Act of 1924, as amended, by section 602 of the Revenue Act of 1928.

feree. Such examination shall be had at such time and place as may be designated in the subpœna."'

COURT REVIEW OF BOARD'S DECISION

SEC. 1001. [Revenue Act of 1926.] (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with

surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.*

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated.

(e) Nothing in subdivision (c) shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

VENUE

SEC. 1002. [Revenue Act of 1926.] Such decisions may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

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*Paragraphs (c) and (d) of this section were amended as here set out by section 603 of the Revenue Act of 1928.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

JURISDICTION

SEC. 1003. [Revenue Act of 1926.] (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

SEC. 1004. (a) The Circuit Courts of Appeals, the Court of Appeals of the District of Columbia, and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay.

(b) The Board is authorized to fix a fee, not in excess of the fee fixed by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record.

DATE ON WHICH BOARD'S DECISION BECOMES FINAL

SEC. 1005. [Revenue Act of 1926.] (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the

Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall be-

come final in the same manner as though no prior decision of the Board had been rendered.

(e) As used in this section—

(1) The term "Circuit Court of Appeals" includes the Court of Appeals of the District of Columbia;

(2) The term "mandate," in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

APPENDIX B—STATEMENT BY THE CHAIRMAN OF THE BOARD OF TAX APPEALS

AMERICAN BAR ASSOCIATION

Organized 1878

COMMITTEE ON FEDERAL TAXATION

1928-1929

HUGH SATTERLEE, *Chairman*
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New York, N. Y.
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Washington, D. C.
MURRAY M. SHOEMAKER
First National Bank Building
Cincinnati, Ohio
HARRY C. WEEKS
Staley Building
Wichita Falls, Texas

March 30, 1929.

Hon. Benjamin H. Littleton, Chairman,
U. S. Board of Tax Appeals,
Washington, D. C.

Dear Sir:

In connection with a brief which this Committee as *amici curiae* is preparing for presentation to the Supreme Court in Old Colony Trust Company v. Commissioner, No. 130, it seems pertinent to the issue to afford that court some description of the actual procedural functioning of your Board.

We would greatly appreciate a brief authoritative description of the practice and procedure before the United

States Board of Tax Appeals and the results of its operation from its inception to the present time.

Very truly yours,
Committee on Federal Taxation
of the
American Bar Association
By GEORGE M. MORRIS,
Secretary.

GMM:hw

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

(SEAL)
BENJAMIN H. LITTLETON
Chairman

April 8, 1929.

Committee on Federal Taxation,
American Bar Association,
George M. Morris, Esq., Secretary.

Sirs:

In compliance with your request of March 30, 1929, I submit the following statement concerning the operations of the United States Board of Tax Appeals:

Since the organization of the Board on July 16, 1924, in order to make a record upon which the issues involved might be presented in an orderly manner and properly determined, the practice and procedure adopted and followed in the hearing of proceedings instituted have been, as far as practicable, in conformity with the practice and procedure obtaining in the United States District Courts in cases heard without the intervention of a jury. Upon

organization the Board published its rules of practice and procedure, which, with slight amendments, are still in force. These Rules are printed in Volume 7 B. T. A. 1357, and for convenience copies are attached hereto.

The petitioner, who is always the taxpayer, institutes his proceeding before the Board by the filing of a petition in which he sets forth the errors claimed to have been made by the Commissioner and a detailed statement of the facts upon which the petitioner relies as a basis of his claim that the deficiency, as determined by the Commissioner, is erroneous in whole or in part, and in addition (if he so claims), that he has overpaid his tax. A copy of this petition is served by the Board upon the Commissioner and within the time fixed by the rules of the Board the Commissioner moves in respect of the petition or within sixty days files an answer specifically admitting or denying the allegations of the petition. The Commissioner is, and was under the 1924 Revenue Act, required affirmatively to allege and prove any new matter. Under the Revenue Act of 1926 the Commissioner has the burden of proof in fraud and transferee cases. The proceeding thereupon becomes at issue and after being placed upon the calendar for hearing, and the parties and their counsel have been notified, the proceeding is called for hearing.

Prior to the hearing the record before the Board consists only of the petition and the answer. Either party may take testimony by deposition and each party is given an opportunity at the hearing to present the oral testimony of witnesses by direct and cross-examination and

such documentary evidence as may be pertinent to the issue involved and competent under the rules of evidence. All testimony is stenographically reported. A docket similar in form and content to the docket of the clerks of the United States District Courts is maintained in which the customary docket entries are made in every proceeding. Since the beginning of the Board's operations it has enforced the rules of evidence in the hearing of all cases. The Revenue Act of 1926 requires that these rules be those applicable in courts of equity of the District of Columbia.

Upon the filing of a petition for review the Board prepares and settles the record in accordance with the rules of the Appellate Courts, and transmits the record to the Clerk of the Court in which review is sought.

The records of the Board show the following with reference to proceedings instituted before it for the period July 16, 1924, to March 31, 1929:

	Total	*Total of deficiencies determined and claimed by the Commissioner*	*Net amount determined by the Board*
Proceedings instituted	43,413	$965,587,760.84	
Total heard and decision entered	24,493	493,870,435.14	$193,056,242.86
Proceedings heard and decided and awaiting entry of decision upon recomputation under Rule 50	340		
Heard and submitted for preparation of opinion	882		
Proceedings pending for hearing on March 31, 1929	17,698		

The Board's records further show the following relative to proceedings instituted prior to February 26, 1926 (the date of approval of the Revenue Act of 1926), and heard and decided between February 26, 1926, and February 28, 1929:

	Total	*Total of deficiencies determined and claimed by the Commissioner*	*Net amount determined by the Board*
Proceedings instituted	12,341		
Heard and decided by formal findings of fact and opinion or by memorandum, or dismissed by order other than by consent or agreement of the parties	5,039	$103,951,480.51	$50,356,225.77
Taken to U. S. Circuit Courts of Appeals by petition for review	370		
Taken to Court of Appeals of District of Columbia	48		
Total appeals decided by Courts	142		
Proceedings as to which the six-months period for filing petition for review had not expired on February 28, 1929	358		
Proceedings heard and decided by Board on the merits by opinion or order as to which the time for filing petition for review had expired	4,263		
Proceedings awaiting hearing by Board	313		
Heard, awaiting opinion	89		
Heard and determined, and awaiting recomputation under Rule 50 for entry of decision	99		

Proceedings decided upon stipulation of the taxpayer and the Commissioner of Internal Revenue as to the deficiency or overpayment, or dismissed upon motion by consent of the parties have been eliminated in arriving at the figure of 5,039 shown above as proceedings heard and decided on the merits.

The following tabulation shows the result of operations as to proceedings instituted and heard and decided between February 26, 1926, and March 31, 1929:

	Total	*Total of deficiencies determined and claimed by the Commissioner*	*Net amount determined by the Board*
Proceedings instituted	31,072		
Proceedings heard and decided by formal findings of fact and opinion or memorandum, or heard and dismissed by order other than by stipulation or agreement of the parties	4,586	$38,296,608.13	$25,563,841.48
Taken to U. S. Circuit Courts of Appeals by petition for review	181		
Taken to Court of Appeals of District of Columbia	11		
Appeals decided by Appellate Courts	31		
Proceedings as to which the six-months period for filing petition for review had not expired	1,101		
Proceedings heard and decided by Board on merits by opinion or order, as to which the period for filing petition for review had expired on March 31, 1929	3,293		

Proceedings decided upon stipulation of the taxpayer and the Commissioner of Internal Revenue as to the deficiency or overpayment, or dismissed upon motion by consent of the parties have been eliminated in arriving at the figure of 4,586 shown above as proceedings heard and decided on the merits.

The term "Net Amount determined by the Board" in the above tabulations means the total of the deficiencies determined by the Board less overpayments found to have been made by the taxpayer.

The following tabulation shows the rate at which proceedings are being instituted and decided by the Board, such tabulation including the period from June, 1928, to and including March, 1929:

Year and Month	*Docketed*	*Cases Decided*			
		By Opinion on the Merits	*Upon stipulation or agreement of deficiency*	*By memorandum or order of dismissal*	*Total decided*
1928					
June	540	259	533	173	965
July	444	120	410	86	616
August	478	76	444	71	591
September	333	134	407	87	628
October	430	169	619	160	948
November	425	153	477	133	763
December	465	97	457	94	648
1929					
January	350	126	460	104	690
February	500	141	557	99	797
March	398	135	650	164	949

Respectfully,

BENJAMIN H. LITTLETON, *Chairman*,
United States Board of Tax Appeals.

RULES OF PRACTICE

BEFORE THE

UNITED STATES BOARD OF TAX APPEALS

Revised to May 1, 1928

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON
1928

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RULES OF PRACTICE BEFORE THE UNITED STATES BOARD OF TAX APPEALS

(These rules are promulgated pursuant to authority of section 907 (a) of the Revenue Act of 1924, as amended by sec. 1000 of the Revenue Act of 1926, which provides in part that "The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.")

RULE 1.—BUSINESS HOURS

The office of the Board at Washington, D. C., will be open each business day from 9 o'clock a. m. to 4.30 o'clock p. m.

RULE 2.—ADMISSION TO PRACTICE

A register will be maintained by the Board in which will be entered the names of all persons entitled to practice before the Board. Corporations and firms will not be admitted or recognized.

The following classes of persons whom the Board finds, upon consideration of their applications, to be of good moral character and to possess the requisite qualifications to represent others may be admitted to practice before the Board:

(a) Attorneys at law who are admitted to practice before the Supreme Court of the United States or the highest court of any State or Territory or the District of Columbia.

(b) Certified public accountants duly qualified under the law of any State or Territory or the District of Columbia.

An application under oath for admission to practice shall be addressed to the United States Board of Tax Appeals, Washington, D. C., and must state the name, residence address, and business address of the applicant, and the time and place of his admission to the bar, or qualification as a certified public accountant. Such application shall also state whether the applicant has ever been suspended or disbarred as an attorney in any court, or his right to practice as a certified public accountant suspended or revoked in any jurisdiction. Such application shall be accompanied by a certificate of the clerk of the court in which the applicant is admitted to practice to the effect that he has been so admitted and is in good standing; or a certificate by the proper State, Territorial, or District

authority to the effect that the applicant is a certified public accountant in good standing, duly qualified and entitled to practice in such State or Territory or the District of Columbia.

(See Form No. 1.)

The Board may, in its discretion, deny admission, suspend, or disbar any person who, it finds, does not possess the requisite qualifications to represent others, or is lacking in character, integrity, or proper professional conduct. An attorney or certified public accountant who has been admitted to practice may be disbarred only after he is afforded an opportunity to be heard.

The Board shall have the right at any time to require a statement, under oath, of the terms and circumstances of any contract of employment of an attorney or certified public accountant with the taxpayer he represents.

Any individual taxpayer or member of a taxpayer partnership may appear for himself or such partnership upon adequate identification to the Board. A taxpayer corporation may be represented by a bona fide officer of the corporation upon permission granted, in its discretion, by the Board or the Division sitting.

RULE 4.—FORM AND STYLE OF PAPERS

All papers filed with the Board shall be either printed or typewritten, and if typewritten shall be on one side of plain white paper only, which shall be not more than 8½ inches wide and 11 inches long, weighing not less than 16 pounds to the ream, folio base 17 by 22 inches, and fastened on the left side. Copies shall be legible, but may be on any weight paper. If printed, they shall be in 10 or 12 point type, on good unglazed paper, 5⅞ inches wide by 9 inches long, with inside margin not less than 1 inch wide, and with double-leaded text and single-leaded quotations. Citations shall be in italics.

RULE 5.—INITIATION OF A PROCEEDING—PETITION

A proceeding shall be initiated by filing with the Board a petition, as provided in Rules 6, 7, and 8. It shall contain:

(*a*) A caption in the following form:

UNITED STATES BOARD OF TAX APPEALS

Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No.....

(*b*) Proper allegations showing jurisdiction in the Board.

(*c*) A statement of the amount of the deficiency, the nature of the ax, the year for which asserted, and the amount thereof (as nearly s may be determined) in controversy.

(*d*) Clear and concise assignments of error alleged to have been ommitted by the Commissioner. Such assignments of error shall e numbered.

(*e*) A clear and concise statement of the facts upon which the etitioner relies as sustaining the assignments of error.

(*f*) A prayer, setting forth relief sought by the petitioner.

(*g*) A verification by the petitioner.

(*h*) A copy of the notice of deficiency shall be appended to the etition.

The petition shall be complete in itself so as fully to inform the Board of the issues to be presented. The petition shall be signed y the petitioner or his counsel and shall be verified by the petiioner. The signature of counsel shall be in individual and not n firm name. The name and mailing address of the petitioner r of counsel shall be typed or printed immediately following the ignature.

The signature of counsel and the verification of the petitioner to he petition shall be considered the certificate of each that there s good ground for the petition, that the proceeding has not been nstituted merely for delay and is not frivolous.

(See Form No. 2.)

RULE 6.—DESIGNATION OF PARTIES

The proceeding shall be brought in the name of the party in nterest. If an individual, the full given name and surname shall e set forth in the caption. If a married woman, her given name hall be used. If a fiduciary, both the names of the fiduciary and f the estate, trust, or other person for whom he acts shall be used. n the event of a variance between the name set forth in the defiiency notice and the correct name, as used in the caption of the etition, a statement of the reasons for such variance shall be set orth in the petition.

The original caption shall be placed on all papers filed.

RULE 7.—FILING OF PETITION

An original and four clear copies of the petition, either printed or ypewritten as provided in Rule 4, shall be filed with the Board at Washington, D. C. The copies of the petition shall be conformed o the original by the petitioner.

Failure to file a sufficient number of copies, as provided in this rule, or to conform to the requirements of Rule 5, shall be ground for dismissal of the proceeding.

RULE 8.—FEE FOR FILING PETITION

A fee of $10 is hereby imposed for the filing, after the enactment of the Revenue Act of 1926, of any petition. No such petition may be filed until such fee is paid to the Board, nor will the filing of any petition be antedated to a time prior to the payment of such fee.

RULE 11.—DOCKET

Upon receipt of the petition, accompanied by the filing fee provided by Rule 8, the proceeding will be docketed and assigned a number and the parties notified thereof. This number shall be placed by the parties on all papers filed thereafter in the proceeding.

RULE 12.—SERVICE ON THE COMMISSIONER

Upon filing of a petition and the copies, as prescribed in Rule 7, the Board will serve a copy upon the Commissioner.

The Commissioner shall not be required to answer any petition unless and until he has been served with a copy thereof as herein provided.

Service of copy of petition on the Commissioner, or a person designated by him, shall suffice in lieu of process.

RULE 14.—ANSWER [1]

After service upon him of a copy of the petition, the Commissioner shall have 60 days within which to file an answer or 45 days within which to move in respect of the petition. The answer shall be so drawn as fully and completely to advise the petitioner and the Board of the nature of the defense. It shall contain a specific admission or denial of each material allegation of fact contained in the petition and shall set forth any new matters upon which the Commissioner relies for defense or affirmative relief. Each paragraph contained in the answer shall be numbered to correspond with the paragraphs of the petition. An original and four copies of the answer shall be filed, of which the original shall be signed by the Commissioner or his counsel and the copies conformed by him.

RULE 15.—SERVICE OF ANSWER

Upon the filing of the answer the Board will serve one copy thereof on the petitioner or his counsel by registered mail.

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[1] Amended May. 1, 1928.

RULE 16.—SERVICE ON COUNSEL

Service of any pleading, order, or notice upon the counsel of record shall be deemed service thereof upon the party.

RULE 17.—JOINDER OF ISSUE

A proceeding shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the petitioner.

RULE 18.—AMENDED AND SUPPLEMENTAL PLEADINGS

The petitioner may, as of course, amend his petition at any time before answer is filed. After answer is filed, a petition may be amended only by consent of the Commissioner or on leave of the Board.

Upon motion made, the Board may, in its discretion, at any time before the conclusion of the hearing, permit a party to a proceeding to amend the pleadings to conform to the proofs.

RULE 19.—FURTHER AND BETTER STATEMENT IN PLEADING MAY BE REQUIRED

A further and better statement of the nature of the claim or defense, or of any matter stated in any pleading, may be ordered in any proceeding.

RULE 20.—EXTENSIONS OF TIME

Continuances, extensions of time (except for the filing of the petition), and adjournments may be ordered by the Board on its own motion or may be granted by it in its discretion on motion of either party filed in writing and showing good and sufficient cause therefor.

RULE 24.—CALENDARS

(*a*) *General calendar.*—All proceedings will as of course be placed upon the general calendar in the order in which they are at issue.

(*b*) *Circuit calendar.*—A proceeding may, in the discretion of the Board and upon timely motion, be placed upon the circuit calendar for hearing outside Washington.

(*c*) *Day calendar.*—The clerk will, from time to time as directed by the Chairman, prepare a day calendar of the proceedings to be heard in Washington and elsewhere, and cases will be placed thereon as nearly as may be in the order in which they are at issue.

(*d*) *Reserve calendar.*—The hearing of a proceeding may be placed on the reserve calendar for good cause shown, as, for example, to await the decision of the Supreme Court in a case pending.

RULE 25.—NOTICE OF HEARING

When a proceeding has been placed upon the day calendar the clerk will, not less than 15 days in advance, notify the parties of the place where and the date when it will be called upon the day calendar.

RULE 26.—HEARING FEES

A hearing fee of $10 is hereby imposed on every proceeding pending before the Board at the time of the enactment of the Revenue Act of 1926, which has not been heard on the merits before such enactment. Such fee shall be paid on demand and before the hearing of any such proceeding. Failure to pay such fee shall be sufficient ground for the dismissal of the proceeding.

RULE 27.—CALL OF CALENDAR AND ASSIGNMENT FOR HEARING

A calendar of proceedings to be heard at Washington will be called at 9.30 a. m., and elsewhere at 10 a. m., on the date set, and the proceedings which are ready to be heard will be assigned for hearing in due course.

RULE 29.—SUBMISSION WITHOUT PERSONAL APPEARANCE

A proceeding in which issue has been joined, in which no issue of fact is raised, or in which evidence of contested facts has been submitted other than by oral hearing before the Board, or one in which there is a contested motion not predicated on an issue of fact, and both parties are not present in person or by counsel at the time of hearing, will be regarded as submitted on the part of the absent party or parties. Briefs may be filed in lieu of personal appearance, but the Board may, in its discretion, require appearance for argument.

Where there is a joinder of issue on questions of fact, the provisions of this rule relative to submission without argument shall not relieve the party upon whom rests the burden of proof from adducing at the hearing proper evidence in support of the issues. Statements in the petition, *ex parte* affidavits, and briefs do not constitute evidence. Failure to adduce evidence in support of facts alleged in the petition and denied by the Commissioner in his answer will be ground for dismissal.

RULE 30.—BURDEN OF PROOF

The burden of proof shall be upon the petitioner, except that in respect of any new matter of fact pleaded in his answer, it shall be upon the respondent.

RULE 31.—DISMISSAL

A proceeding may be dismissed for cause upon motion of either party or by the Board upon its own motion.

RULE 32.—MOTIONS

Motions must be timely and, except during trial, must be in writing, and an original and four copies filed. One copy will be served upon the adverse party. Motions will be acted upon as justice may require and may, in the discretion of the Board, be placed upon the day calendar in Washington for argument, and in that event both parties will be notified thereof not less than 15 days before the date so set.

The filing of a motion shall not constitute cause for postponement of a hearing from the date set.

RULE 35.—BRIEFS

Briefs may be filed within the time fixed by the Division before which the hearing is had. If the briefs are typewritten, an original and 4 copies shall be filed; if printed, 20 copies.

Briefs shall contain, in the order here stated:

(*a*) A statement of the nature of the tax and how the proceeding comes before the Board.

(*b*) A concise statement of the facts, which should contain references to the pages of the transcript or to the exhibits relied upon in support thereof.

(*c*) A concise statement of the points upon which the petitioner relies.

(*d*) The argument.

Every brief of more than 20 pages shall contain on its front flyleaves a table of contents with page references, supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

RULE 36.—SUBSTITUTION OR WITHDRAWAL OF COUNSEL—NOTICE OF APPEARANCE

Counsel of record shall promptly notify the Board of his withdrawal as counsel for the petitioner in any proceeding pending. Where the petition is not subscribed by counsel, or counsel has withdrawn, counsel subsequently appearing for the petitioner shall immediately file a notice of appearance, which shall include a statement of the mailing address of such counsel.

RULE 37.—SUBSTITUTION OF PARTIES

In the event of the death of a petitioner or for other cause, the Board may order the substitution of the proper parties. In event of mistake in the name of title of a proper party the Board may order substitution of the proper name or title in any proceeding before the Board.

RULE 38.—STIPULATIONS

The parties may, by stipulation in writing filed with the Board or presented at the hearing, agree upon any facts involved in the proceeding.

RULE 39.—EVIDENCE

The rules of evidence applicable in courts of equity of the District of Columbia shall govern the admission or exclusion of evidence before the Board or any of its Divisions.

RULE 40.—TRANSCRIPTS OF PROCEEDINGS

Hearings before the Board or its Divisions shall be stenographically reported and a transcript thereof shall be made if, in the opinion of the Board or of the Division holding the hearing, a permanent record of the hearing is deemed necessary. Transcripts shall be supplied to the parties and to the public by the official reporter at such rates as may be fixed by contract between the Board and the reporter.

RULE 43.—DOCUMENTARY EVIDENCE

(*a*) When books, records, papers, or documents have been received in evidence, a copy thereof or of so much thereof as may be material or relevant may, in the discretion of the Division holding the hearing, be substituted therefor.

(*b*) After the decision of the Board in any proceeding has become final the Board may, upon motion of either party, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any Division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

RULE 44.—SUBPŒNAS[1]

(*a*) *How issued.*—No subpœna will be issued at the instance of either party except upon written application timely made.

(*b*) *Application for.*—The application shall state the name and address of each witness required, the time and place at which and the person before whom he is to appear, and whether he may designate someone to appear in his place.

(See Form No. 3.)

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[1] Amended Dec. 27, 1927.

(c) *For production of documents.*—If evidence other than oral testimony is required, such as documents or written data, the application shall set forth the specific matter to be produced and sufficient facts to indicate that such matter is reasonably necessary to establish the cause of action or defense of the applicant.

(d) *Service and proof.*—The Board will not serve subpœnas, but will leave service to be procured by the party making the application. Service may be made by any citizen of the United States over the age of 21 years and competent to be a witness, and not a party to or in any way interested in the proceeding. Proof of service may be made by affidavit.

(See Form No. 4.)

RULE 45.—DEPOSITIONS

Depositions may be taken in accordance with the following rules:

(a) *Application to take.*—When either party proposes to take a deposition, a verified application, with two conformed copies, shall be filed with the Board setting forth the following:

(1) The name and post-office address of the witness whose deposition is proposed to be taken.

(2) The subject matter or matters concerning which the witness is to testify, together with a statement of the reasons why it is desired to take the depositions and why the witness should not be required to appear personally and testify at the hearing.

(3) The time and place of taking the deposition and the name, post-office address, and official designation of an individual competent to administer oaths under the Revenue Act of 1926 before whom it is proposed that the deposition shall be taken.

(See Form No. 5.)

(b) *Order for.*—Upon receipt of such application, the Board will serve a copy thereof on the opposite party, allow a reasonable time for objection thereto and will, in its discretion make an order, copy of which will be mailed or delivered to the parties or their counsel, wherein the Board will name the witness whose deposition is to be taken and specify the time when, the place where, and the officer before whom the witness is to testify, but such time and place and the officer before whom the deposition is to be taken, so specified in the Board's order, may or may not be the same as those named in the application to the Board.

(See Form No. 6.)

(c) *By stipulation.*—At any time after issue is joined the parties or their counsel may, by stipulation duly signed and filed, take depositions. In such cases the stipulation shall state the name and address of each witness, the time when, and the place where such

deposition will be taken, and the name, address, and official title of the officer before whom it is proposed to take the deposition. In such cases no order to take such deposition will be issued, but such deposition shall be taken and returned by the officer in accordance with the rules of the Board.

(*d*) *Manner of taking.*—Each question propounded to the witness must be recorded and his answers must be taken down in his own words.

Objections to questions or answers shall be explicitly but briefly and concisely stated, but no comment, explanation, or argument of any kind shall be recorded; neither shall there be recorded any comment, explanation, or argument by examining counsel. Any matter reported in violation of this rule may be sufficient cause for the suppression of the deposition.

(*e*) *Witnesses not named in notice.*—If both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witness produced under the notice, be entitled to produce and examine other witnesses; but in such case one day's notice must be given to the adverse party or his attorney there present, unless such notice is waived.

RULE 46.—GENERAL PROVISIONS AS TO DEPOSITIONS

(*a*) *Other witnesses to be excluded.*—At the request of either party a person whom either expects or intends to call as witness in the same case or in any kindred case shall be excluded from the room where the testimony of a witness is being taken. If such person remains in the room or within hearing of the examination after such request has been made, he shall not thereafter be admitted to testify in the case or any kindred case except by the consent of the party who requested his exclusion.

(*b*) *Of the oath.*—Witnesses must be sworn or affirmed before any questions are put to them.

(*c*) *Depositions to be signed.*—The testimony of the witness when transcribed shall be read over to or by him and be signed by him.

(*d*) *What return must show.*—In his return the officer must show that the witness was properly sworn or affirmed and that the questions and answers were taken down in his presence.

(See Form No. 6.)

(*e*) *Sheets to be attached.*—The officer must so fasten the sheets of the deposition that they can not be tampered with. He must spare no pains to return to the Board the exact evidence he has taken. All exhibits must be carefully marked so as to be capable of identification and when practicable must be attached to the deposition.

(*f*) *Caption.*—The officer must state in the caption of the deposition the cause in which it was taken, the place and date of taking, the

name of the witness, the party by whom called, and the names of parties and counsel present, and the body of the deposition must also show by whom the witness was examined and cross-examined.

(*g*) *Qualification of officer.*—In no case shall a deposition be taken before any person who has any office connection or business employment with the taxpayer or his attorney except by consent of parties and when no other officer is available, and in his certificate to such deposition such officer shall so certify.

(*h*)[1] *Return of.*—The officer must inclose the original depositions and exhibits, together with two copies of the depositions, in a sealed packet, with postage or charges prepaid, and direct and mail or express the same to the United States Board of Tax Appeals, Washington, D. C. In each case the original of the depositions must be directed and mailed or expressed to the Board. The officer may, upon written request, deliver a copy of the depositions to either or to both of the parties, or to their representatives, in lieu of sending such copies to the Board as above provided. If one or both of the required copies are delivered by the officer taking the depositions, he shall attach to his return the written request of the party or parties, or of their counsel to whom such copy or copies were delivered, and shall state in his certificate of return the fact of delivery by him of such copy or copies. If copies of the depositions are delivered by the officer taking the same, no service of copies of such depositions upon the party or his counsel of record will be made by the Board.

(*i*) *Limitation on time for application to take.*—Applications to take depositions must be filed at least 30 days prior to the date set for the hearing of the proceeding, and such depositions must be completed and filed with the Board at least 10 days prior to the hearing: *Provided*, Such applications will not be regarded as sufficient ground for the granting of a continuance from the date or place of the hearing theretofore set, unless the proceeding shall have been at issue less than 60 days and the motion for continuance shall have been filed not less than 20 days prior to said date of hearing: *Provided further*, That under special circumstances, and for good cause shown, the Board may otherwise order.

RULE 47.—DEPOSITIONS ON WRITTEN INTERROGATORIES

Depositions may be taken in the discretion of the Board on written interrogatories in substantially the same manner as provided in Rules 45 and 46 for depositions on oral examinations. The interrogatories must be filed with the applications in triplicate and a copy thereof will be served upon, or mailed to, the opposite party by the Board. Within 10 days after such notice such opposite party

[1] Amended Aug. 1, 1927.

may file with the Board his objections, if any, to such interrogatories, together with any cross-interrogatories he desires to propose. If he file cross-interrogatories, they shall be filed with the Board in triplicate and one copy thereof will be forwarded to the opposite party, or his counsel, who shall within 10 days thereafter file his objections, if any, to such cross-interrogatories. No objections to the interrogatories or cross-interrogatories will be considered at the hearing unless taken before the order for the taking of the deposition issues.

When a deposition is taken upon written interrogatories and cross-interrogatories neither the counsel for the taxpayer nor for the Commissioner, nor any person other than the witness, a stenographic reporter and the officer taking the deposition shall be present at the examination of the witness, which fact shall be certified by the officer taking the deposition who shall in such case propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness's own words.

Depositions obtained in foreign countries must be taken on written interrogatories.

RULE 59.—SETTLEMENT OF FINAL DETERMINATION [1]

When the Board determines the issues in any proceeding and withholds final decision of the deficiency or overpayment for later computation, the parties shall, if they are in agreement as to the amount of the deficiency or overpayment, in accordance with the determination of the Board, file with the Board an original and four copies of a computation showing the amount for entry of final decision forthwith. If the parties are not in agreement as to the amount to be entered in the final decision, either of them may file with the Board a computation of the deficiency or overpayment believed by him to be in accordance with the determination of the Board. The clerk will serve a copy thereof upon the opposite party and will thereupon place the matter upon the day calendar for hearing in due course and give the usual notice. If the opposite party fails to file objection, accompanied by an alternative computation, within 5 days prior to the date of such hearing, or any continuance thereof, the deficiency or overpayment shown in the computation already submitted shall be taken to be correct and decision thereon will be entered. If the parties submit different computations and amounts, they will be afforded an opportunity to be heard thereon on the date fixed, and the Board will determine the correct deficiency or overpayment and enter final decision.

Any hearing under this rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no

[1] Amended Apr. 28, 1928.

argument will be heard upon or consideration given to the issues or matters already disposed of by such determination or of any new issues. This rule is not to be regarded as affording an opportunity for rehearing or reconsideration.

RULE 51.—COSTS—PREPARATION OF RECORD ON REVIEW[1]

It shall be the duty of the clerk, immediately after the contents of a record on review have been settled or agreed to, to notify the petitioner of the costs and charges for the preparation, comparison and certification of said record; such charges to be determined in accordance with the provisions of an Act of Congress entitled "An Act to provide fees to be charged by clerks of the district courts of the United States," approved February 11, 1925, 43 Stat. 857–8.

No transcript will be certified and transmitted to the appellate court until the costs and charges therefor have been paid to the Board.

RULE 52.—COSTS—PRINTING OF RECORD ON REVIEW[2]

In each proceeding for review of a decision of the Board by the United States Circuit Court of Appeals for the Second Circuit when review is sought by the Commissioner of Internal Revenue, the clerk of the Board shall, immediately after the contents of the record on review, as required by Rule 35 of the Court, have been settled or agreed upon, make available to the Commissioner, or his counsel, the record of the Board in the proceeding. The Commissioner shall cause the record to be printed. Sixteen copies of the printed record shall be delivered to the clerk of this Board for certification and filing with the clerk of the Circuit Court of Appeals. The clerk of the Board shall serve five copies of the printed record upon counsel for the taxpayer by registered mail.

RULE 60.—FEES AND MILEAGE

The following is from the Revenue Act of 1926:

"SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

"(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

---

[1] Adopted July 2, 1927.

[2] Adopted Dec. 6, 1927.

"(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

"(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926."

No witness, other than one for the Commissioner, shall be required to testify in any proceeding before this Board until he shall have been tendered the fees and mileage to which he is entitled in accordance with the above provision of law.

RULE 61.—COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS

When the time prescribed by these rules for doing any act expires on a Sunday or a legal holiday in the District of Columbia, such time shall extend to and include the next succeeding day that is not a Sunday or such a legal holiday: *Provided*, That when the time for performing any act is prescribed by statute nothing in these rules shall be deemed to be a limitation or extension of the statutory time fixed.

The following-named days are legal holidays within the District of Columbia:

New Year's Day, January 1 (Sec. 993, Revised Stat. relating to D. C.).

Washington's Birthday, February 22 (Act of January 31, 1879).

Inauguration Day, every fourth year (Act of June 18, 1888).

Decoration Day, May 30 (Act of August 1, 1888).

Fourth of July (Sec. 993, Revised Stat. relating to D. C.).

Labor Day, first Monday in September (Act of June 28, 1894).

Thanksgiving Day, day proclaimed by President (Sec. 993, Revised Stat. relating to D. C.).

Christmas Day, December 25 (Sec. 993, Revised Stat. relating to D. C.).

When legal holidays fall on Sunday the next day shall be a holiday (Act of December 20, 1881).

RULE 62.—SPECIAL ASSESSMENT[1]

(*a*) If some of the issues raised by the petition involve section 327 or section 328 of the Revenue Act of 1918 or of 1921 (or section 210 of the Revenue Act of 1917, as the case may be), and some do not involve such sections, the hearing may, in the discretion of the Board, on motion, be limited in the first instance to trial of the issues which do not involve such sections.

[1] Adopted Dec. 28, 1927.

(*b*) After decision on such other issues, or if no such other issues are raised by the pleadings, a hearing may, in the discretion of the Board, on motion, be had, limited to the trial of the issue whether the petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be).

(*c*) If the Board decides that the petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be), the respondent shall within 60 days after such decision file with the Board an original and four copies of a proposed redetermination showing the basis and method of the computation. If, within 20 days after service by the Board upon the petitioner of a copy of such proposed redetermination, the parties are unable to agree upon the amount of tax, either party may move, or the Board may upon its own motion order, that the case be placed upon the day calender for further hearing, at which either party may submit proof of the correct amount of tax and deficiency or overpayment.

(*d*) If from the pleadings or otherwise it appears of record before the Board that the parties agree that petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be), and the only issue is as to the correct amount of the tax so determined, the case will be placed upon the day calender in due course for hearing, at which either party may submit proof of the correct amount of the tax and deficiency or overpayment.

APPENDIX

FORMS

These forms are subject to amendment as circumstances may render necessary.

No. 1. Application for admission to practice.
No. 2. Petition.
No. 3. Application for subpœna.
No. 4. Subpœna.
No. 5. Application for order to take depositions.
No. 6. Order to take depositions and certificate on return.

(NOTE.—Read Rule 4 of the Rules of Practice of the Board and carefully observe the requirements thereof as to form, size, and style of papers.)

No. 1.—APPLICATION FOR ADMISSION TO PRACTICE

(See Rule 2)

UNITED STATES BOARD OF TAX APPEALS

APPLICATION FOR ADMISSION TO PRACTICE

I, _____, hereby apply for admission to practice before the United States Board of Tax Appeals, and submit the following:

1. I reside at _____, _____
(Street number) (City)
_____, _____.
(County) (State)

2. My office address is _____, _____
(Street number) (City)
_____, _____
(County) (State)

3. I was admitted to the bar of the _____ Court, of the
(Enter name of highest court)
State of _____, on the _____ day of _____ 192__, and have never been suspended or disbarred from practice before said court or any court of any State or the United States, except as follows: _____
_____

4. I am a member (or associate) of the firm _____.
_____

5. I am a member of _____
(State membership in professional societies)

No. 1.—APPLICATION FOR ADMISSION TO PRACTICE—Continued

Certified Public Accountants will use the following:

I was issued a certificate and authorized to practice as a certified public accountant by the_____of the State of_____
(Give name of board or commission)
on the_____day of_____, 192__, and such certificate has never been revoked nor have I been suspended from practice, except as follows:

_____

_____

_____

I am a member of_____
(State names of accountants' societies to which you belong)

_____

_____

and have never been suspended or expelled from any such society or any other recognized society of certified public accountants, except as follows:

_____

_____

_____
(Name of applicant)

STATE OF_____ }
*County of*_____ } *ss:*

_____, being first duly sworn, says that he is the person named in the foregoing application for admission to practice before the United States Board of Tax Appeals and that the statements of fact therein contained are true.

_____
(Signature of applicant)

Subscribed and sworn to before me this_____day of_____, 192__

_____

_____

CERTIFICATE

I, _____
(State whether clerk of court or secretary of State board or commission of accountancy)
hereby certify that_____, the applicant for admission to practice before the United States Board of Tax Appeals, is duly admitted to practice as_____by the
(State whether attorney or C. P. A.)
_____of the State of
(State name of court or State board or commission of accountancy)
_____and that he is now in good standing as such
(State whether attorney or C. P. A.)

_____
(Clerk of court or secretary of State board or commission of accountancy)

Dated_____, 192__.

[SEAL.]

No. 2.—PETITION

(See Rules 4, 5, 6, 7, and 8)

UNITED STATES BOARD OF TAX APPEALS

Petitioner, *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. ----------

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols) dated ----------, 192--, and as a basis of his proceeding alleges as follows:

1. The petitioner is (set forth whether individual, corporation, fiduciary, etc., as provided in Rule 6) with principal office (or residence) at ---------- (Street) ---------- (City) ---------- (State).

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on ----------, 192--.

3. The taxes in controversy are (income, profits, estate, or gift) taxes for the (calendar or fiscal) year 19--- and for ---------- dollars (state as exactly as possible the amount in dispute).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors: (Enumerate specifically the assignments of error in a concise manner and avoid pleading facts which properly belong in the succeeding paragraph.)

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows: (Here set forth allegations of the facts relied upon—but not the evidence—in orderly and logical sequence, with subparagraphs lettered, so as fully to inform the Board of the issues to be presented and to enable the Commissioner to admit or deny each specific allegation.)

Wherefore, the petitioner prays that this Board may hear the proceeding and (here state the relief desired).

Counsel for Petitioner,

(Post-office address)

STATE OF ----------
County of ---------- } *ss:*

----------, being duly sworn, says that he is the petitioner (if a corporation, or fiduciary, state title of office or trust of person verifying and that he is duly authorized to verify the foregoing petition) above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

Subscribed and sworn to before me this---------- day of----------, 192---.

No. 3.—APPLICATION FOR SUBPŒNA

(See Rule 44)

UNITED STATES BOARD OF TAX APPEALS

---------- ,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. ----------

APPLICATION FOR SUBPŒNA

To the United States Board of Tax Appeals:

Application is hereby made for the issuance of a subpœna for the attendance before ----------

(The United States Board of Tax Appeals, or the name and official title of the person authorized to take depositions)

at ---------- of the following persons whose oral testimony is desired on behalf of ---------- in the matter of the tax liability of the above-named petitioner now pending on appeal:

(Petitioner or respondent)

NAME	ADDRESS
----------	----------
----------	----------
----------	----------
----------	----------
----------	----------

Details required under Rule 44:

Dated ----------, 192...

(Signed) ----------

No. 4.—SUBPŒNA

(See Rule 44)

UNITED STATES BOARD OF TAX APPEALS

---------- ,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. ----------

SUBPŒNA

The President of the United States of America:

To ---------- Greeting.

You are hereby commanded under penalty of law to be and appear in your proper person before the ----------

(United States Board of Tax Appeals or the name and official title of the person authorized to take depositions)

No. 4.—SUBPŒNA—Continued

at ---------- on the ---------- day of ----------, 192--,
at ---------- o'clock ---- m., then and there to testify on behalf of
(Petitioner or respondent)
---------- in the matter of the tax liability of ----------
now pending before this Board.

You are required to bring with you the following, to wit: ----------
---

By order of the United States Board of Tax Appeals, this ---------- day of ----------, 192--.

[SEAL.]

(Member)

PROOF OF SERVICE

STATE OF ----------}
County of ----------} *ss:*

----------, being first and duly sworn, says:—I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding in which this subpœna was issued.

That on the ---------- day of ----------, 192--, I served the annexed subpœna on the following witnesses named therein at the places set opposite their respective names, by delivering to and leaving with each of them personally a copy of said subpœna and at the same time exhibiting to each of them this original:

NAME	PLACE OF SERVICE
----------	----------
----------	----------
----------	----------
----------	----------

(For witnesses subpœnaed on behalf of petitioner.)

That at the time of such service I tendered to each of said witnesses the sum of $ ----------, the same being the fees and mileage required by Rule 60 of the Rules of Practice of the Board.

Subscribed and sworn to before me
this ---------- day of ---------, 192--.

No. 5.—APPLICATION FOR ORDER TO TAKE DEPOSITIONS

(See Rules 45, 46, and 47)

UNITED STATES BOARD OF TAX APPEALS

....., Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. .....

APPLICATION FOR ORDER TO TAKE DEPOSITIONS

To the United States Board of Tax Appeals:

1. Application is hereby made by the above-named ..... (Petitioner or respondent) for an order to take the deposition.. of the following-named person..:

NAME OF WITNESS	POST-OFFICE ADDRESS
(a)	.....
(b)	.....
(c)	.....
(d)	.....

2. It is desired to take the depositions of the persons above named and each of them for the following reasons:

(a) .....will testify to the following material matters: .....

.....

(Set forth briefly the matter upon which said witness will be called to testify)

(b) .....will testify to the following material matters: .....

.....

(c) .....will testify to the following material matters: .....

.....

(d) .....will testify to the following material matters: .....

.....

3. The reasons why..... (Petitioner or respondent) desires to take the testimony of the above-named persons rather than have them appear personally and testify before the Board are as follows: (State specifically reasons for each witness for whom subpœna is required.)

4. It is desired to take the testimony of ..... (Names of witnesses)

.....

on the ..... day of ....., 192.., at the hour of ..... o'clock .... m.

(A date sufficiently in advance of the day set for hearing of the proceedings to enable the deposition to be completed and filed with the Board at least 10 days prior to the hearing)

before ..... in the City of .....

(State name and title of official)

State of ..... at Room .....

(Give number of room, street number, and name of building.)

No. 5.—APPLICATION FOR ORDER TO TAKE DEPOSITIONS—Continued

5. That _____ is a
(Name of official before whom depositions are to be taken)
_____, who has no office connection or business employ-
(Give official title)
ment with the petitioner or his counsel.

Dated _____, 192__.

_____
Counsel for Petitioner.

STATE OF _____ }
County of _____ } *ss:*

_____, being duly sworn, says that the foregoing
(Petitioner or counsel)
application for order to take depositions is made in good faith and for the reasons therein stated and that the same is not made for purposes of delay.

_____

Subscribed and sworn to before me this
_____ day of _____, 192__.

_____

No. 6.—ORDER TO TAKE DEPOSITIONS

(See Rule 45)

UNITED STATES BOARD OF TAX APPEALS

_____
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE
Respondent.
} Docket No. _____

ORDER TO TAKE DEPOSITIONS

On consideration of the application of _____ to take
(Petitioner or respondent)
the testimony by deposition of _____
(Names of witnesses)
_____
residing at _____, alleged to be material witnesses in this proceeding, at _____
(Room number, street number, and place)
_____ on the _____ day of _____, 192__, at ____ o'clock __ m., and it appearing therefrom that _____ a _____ of _____ is a person
(Official title) (Address)
authorized to administer oaths under the Revenue Act of 1926, it is by the Board:

ORDERED, that the depositions of the said witnesses above named be taken at _____
(Room number, street number, and place)
_____ commencing on the _____ day of _____, 192__, at ____ o'clock __ m.

And it is further ORDERED, That the said depositions be taken before _____ of _____, a _____
(Official title)
who is hereby designated by the Board for that purpose.

No. 6.—ORDER TO TAKE DEPOSITIONS—Continued

The said depositions shall be taken and the same returned to this Board in accordance with the rules of the Board.

_____
(Member, United States Board of Tax Appeals)

Dated _____, 192__.
[SEAL.]

CERTIFICATE ON RETURN

(See Rule 46)

I, _____, the person named in the foregoing order to take depositions, hereby certify:

1. I proceeded, on the _____ day of _____, A. D. 192__, at the office of _____, in the city of _____, State of _____, at _____ o'clock, __ m., under the said order and in the presence of _____ and _____, the counsel of the respective parties, to take the following depositions, viz:

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

That said witness ____ were examined under oath at such times and places as conditions of adjournment required, and that the testimony of said witness __ (or their answers to the interrogatories filed) was taken stenographically and reduced to typewriting by me or under my direction.

2. I further certify that after the said testimony of said witness ____ was reduced to writing the transcript of the testimony was read and signed by said witness ____ in my presence, and that _____ acknowledged
(Each of them or he)
before me that said testimony was in all respects truly and correctly transcribed.

3. I further certify that, after the signing of the deposition in my presence, no alterations or changes were made therein.

4. I have no office connection or business employment with the petitioner or his attorney except that of _____, objection to which was waived
(State connection)
by both the parties to the proceeding.

[SEAL.]

_____
(Signature of person taking deposition)

_____
(Official title)

(NOTE.—This Certificate on Return, when properly executed, and also the Order to Take Depositions, should be attached to and bound with the transcript, preceding the first page thereof. It should then be inclosed in a sealed envelope and addressed to United States Board of Tax Appeals, Earle Building, Washington, D. C. See Rules 45 and 46 of the Rules of Practice and Procedure of the Board as to specific requirements for taking depositions.)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 130.

OLD COLONY TRUST COMPANY, ET AL., *Executors,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION OF W. A. SUTHERLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

W. A. SUTHERLAND,
Counsel, Amicus Curiae.

SUTHERLAND & TUTTLE,
JOSEPH B. BRENNAN,
Of Counsel.

PEARSON'S, 519 ELEVENTH STREET NORTHWEST

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

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OLD COLONY TRUST COMPANY, ET AL., *Executors,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please The Court:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

W. A. SUTHERLAND,
Counsel, Amicus Curiae.

SUBJECT NDEX.

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IN THE

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MOTION OF W. A. SUTHERLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

We represent a taxpayer whose case was appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926. The hearing was had and decision rendered after the passage of the 1926 Act. The decision was against the taxpayer and the case was appealed to the Cir-

cuit Court of Appeals. The Circuit Court of Appeals rendered judgment sustaining the Board's decision on the ground that taxpayer had not introduced sufficient evidence to sustain its contentions. Petition was made to this court for certiorari and certiorari was denied. Our interest lies in showing that the Circuit Court of Appeals does not have jurisdiction in this class of cases because its judgment does not preclude the taxpayer from claiming a refund and suing therefor, and does not preclude the Commissioner of Internal Revenue—an Executive Officer—from voluntarily granting a refund.

We address ourselves, therefore, to a partial answer to the Court's first question propounded on February 18, 1929:

> "Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?"

Our answer to this question relates only to cases appealed to the Board of Tax Appeals prior to the passage of the 1926 Act and in which hearing was had and decision rendered after the passage of the 1926 Act.

We regret that we were called into this matter so late that we have not been able to make the exhaustive research of the authorities, especially as relates to certain broad constitutional questions, which the Court's inquiry in this case presents an opportunity to develop. However, our answer does not require a consideration of these questions. It rests on statutory construction. The only constitutional questions which it involves are beyond dispute. If the Court should, in view of the vast importance of the question, at any time desire a reargument of the matter, we trust that we may be given permission to file another brief going into these other questions.

II.

STATUTES INVOLVED.

The pertinent portions of the Revenue Acts of 1924 and 1926 are set forth in the first supplemental brief of the Commissioner of Internal Revenue. It is unnecessary, therefore, again to set forth these statutes.

III.

ARGUMENT.

Summary of Argument.

1. We concede for purposes of this brief that the Circuit Court of Appeals does have jurisdiction of appeals from the Board of Tax Appeals in cases appealed to the Board subsequent to the passage of the Revenue Act of 1926.

2. The Circuit Court of Appeals does not have jurisdiction of cases appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926, if its judgment may be upset by executive action in allowing claim for refund based upon the same cause of action or by the judgment of another court in an action on a rejected claim for refund.

3. In cases filed with the Board of Tax Appeals prior to the passage of the Revenue Act of 1926, that Act expressly reserves to taxpayer the right to file claim for refund and, if it is rejected, to bring suit thereon, notwithstanding the decision of the Board of Tax Appeals and affirmance by the Circuit Court of Appeals.

4. If the Circuit Court of Appeals' decision were final, it would in many cases be possible for the Commissioner of Internal Revenue to deprive taxpayer of the right to

file claim for refund and sue thereon, in spite of the express guarantee of this right contained in the Revenue Act of 1926.

1. WE CONCEDE FOR PURPOSES OF THIS BRIEF THAT THE CIRCUIT COURT OF APPEALS DOES HAVE JURISDICTION OF APPEALS FROM THE BOARD OF TAX APPEALS IN CASES APPEALED TO THE BOARD SUBSEQUENT TO THE PASSAGE OF THE REVENUE ACT OF 1926.

We agree with the argument in the American Bar Association brief with reference to the constitutionality of the provisions giving jurisdiction to the Circuit Court of Appeals to review decisions of the Board of Tax Appeals in cases filed with the Board subsequent to the passage of the 1926 Act. There the judgment of the Board is final unless appeal is taken to the Circuit Court of Appeals, and the judgment of the Circuit Court of Appeals is final unless certiorari is granted by this court. The Commissioner does not have authority to allow a refund of taxes contrary to the decision of the Board, or if the case is appealed, contrary to the decision of the Court. Nor can the taxpayer in such a situation maintain suit for refund. Under such circumstances the jurisdiction of the Circuit Court of Appeals should certainly be sustained if this Court is to continue to permit appeals from the Federal Trade Commission and the Secretary of Agriculture and the Board of General Appraisers and the like.

The situation where the appeal to the Board of Tax Appeals is taken prior to the passage of the 1926 Act is entirely different.

2. THE CIRCUIT COURT OF APPEALS DOES NOT HAVE JURISDICTION OF CASES APPEALED TO THE BOARD OF TAX APPEALS PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1926 IF ITS JUDGMENT MAY BE UPSET BY EXECUTIVE

ACTION IN ALLOWING CLAIM FOR REFUND BASED UPON THE SAME CAUSE OF ACTION OR BY THE JUDGMENT OF ANOTHER COURT IN AN ACTION ON A REJECTED CLAIM FOR REFUND.

If the judgment of the Circuit Court of Appeals upon appeal from the Board of Tax Appeals is not conclusive of the rights of the parties so that no change can be made in these rights by an executive officer of the Government or by a court in a suit upon a rejected claim for refund, the Circuit Court of Appeals is without jurisdiction. As a matter of constitutional law we do not feel that this requires the citation of authority. The Committee of the American Bar Association in its first brief as amici curiae, attempting to sustain jurisdiction of the Circuit Court of Appeals, make it perfectly clear that they do not question this proposition.

See *Hayburn's Case*, 2 Dallas 409n (1792).
U. S. v. *Ferreira*, 13 How. 40 (1851).
Gordon v. *U. S.*, 2 Wall. 561, 117 U. S. 697 (1865).

In order therefore to show that the Circuit Court of Appeals does not have jurisdiction it is necessary only to show that its judgment does not have such finality as will bar a refund by the Commissioner of Internal Revenue or suit therefor by the taxpayer upon the same cause.

3. IN CASES FILED WITH THE BOARD OF TAX APPEALS PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1926, THAT ACT EXPRESSLY RESERVES TO TAXPAYER THE RIGHT TO FILE CLAIM FOR REFUND AND BRING SUIT THEREON NOTWITHSTANDING THE DECISION OF THE BOARD OF TAX APPEALS AND AFFIRMANCE BY THE CIRCUIT COURT OF APPEALS.

Prior to the passage of the 1926 Act the decision of the Board of Tax Appeals was not binding upon either party. The Commissioner could bring suit in court to recover any

taxes disallowed by the Board and the taxpayer could bring suit in court to recover any amounts found to be due by the Board and paid by the taxpayer, or the Commissioner could refund to the taxpayer without suit. The Boards' findings were only *prima faice* evidence. The result was that when a taxpayer appealed to the Board of Tax Appeals he did not surrender the right always preserved to him by the Revenue Acts of the United States—even though not required by the Constitution—to file suit against the collector in the district court and have a jury trial on all issues of fact. The Commissioner, if he lost, could bring a suit *de novo* in the District Court.

When Congress came to enact the Revenue Act of 1926 it had come to feel that there was unnecessary duplication of effort where a case was tried, according to legal procedure, in the Board of Tax Apeals and then tried over again in an action in the District Court brought by the losing party. It therefore provided that no claim for refund should ever be filed if the taxpayer, within the sixty days after the receipt from the Commissioner of the notice giving him the right to go to the Board of Tax Appeals, filed appeal with the Board of Tax Appeals. It is not necessary that the case ever be heard. Even if the petition is voluntarily withdrawn by the taxpayer, his rights to a judicial determination of his tax liability is forever barred.

Congress felt it was necessary to provide specially for cases in which the petition was filed before the 1926 Act and the hearing had and the decision rendered thereafter. It might have treated these cases just as it treated those cases in which the hearing was had before the passage of the 1926 Act, leaving the taxpayer and the Commissioner without right of appeal, just as under the 1924 Act. It might have provided that the decision of the Board was final and barred refund and that an appeal was the only remedy. It might possibly have provided that though the decision of

the Board of Tax Appeals was not final, the case could be appealed to the Circuit Court of Appeals and its decision would be final, though there is some doubt as to the constitutionality of such a provision. Congress did not do either of these things, but provided that the only remedy of the Commissioner is by appeal, if he is dissatisfied with the decision, and that the tapayer may appeal or not, as he chooses, but provided that in any event the taxpayer shall not be barred from filing claim for refund. That is tantamount to saying that the decision of the Circuit Court of Appeals is not final; and, as stated above, Congress could not constitutionally provide for an appeal to the Circuit Court of Appeals where that Courts' decision is subject to administrative review, or to be upset by suit upon a rejected claim for refund.

In referring to cases of the character here discussed, Section 283(b) says:

> "In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and *except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.*

Section 284(d)—which appears in that section of the 1926 Act granting to taxpayers the right to file a claim for refund of all income taxes overpaid—is directed to excepting from the provisions of section 284(a) those cases in which appeal to the Board of Tax Appeals shall operate to bar a claim for refund. The exception, by its express terms, is confined to cases where the taxpayer, "after the

enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed."

It is conceded by all that section 283(b) permits the taxpayer, whose petition is filed with the Board prior to the 1926 Act, to file a claim for refund and to sue thereon, though the Board has rendered a decision against him. It has been contended, however, that section 283(b) is to be construed to provide that if the taxpayer then carries the matter to the Circuit Court of Appeals, the decision of that court is final and bars any claim for refund.

It is respectfully submitted that the language of the section 283(b) does not lend itself to any such interpretation. In the same sentence with the provision which preserves the taxpayer's right to a claim for refund in cases appealed to the Board prior to the 1926 Act by excepting them from the provisions of Section 284(d), we find not only a reference to the jurisdiction of the Board but also to the jurisdiction of the reviewing courts. This same sentence which preserves the right to a refund provides for review by the courts, and does not distinguish cases appealed to the courts from those not so appealed. The language of that paragraph clearly considers both the Board and the Court reviewing the Board's decision as forums in which no determination will be reached which will bar a claim for refund.

This section preserves in clear language the right of the taxpayer filing with the Board prior to the 1926 Act to file claim for refund, although he goes to the Board and carries the Board's decision to the courts for review. It is simply a wishful argument which construes it so as not to allow to the taxpayer the right to file claim for refund and bring suit thereon with the attendant advantages of a jury trial. The language makes absolutely no distinction, so far as the right to claim for refund is concerned, between

a case where appeal has been taken to the Circuit Court of Appeals and one where appeal has not been so taken.

Stress is laid, however, upon the provisions of Section 1003(a) of the 1926 Act which provides that the judgment of the Circuit Court of Appeals on review of decisions of the Board shall be "*final,*" except that it shall be subject to review by the Supreme Court of the United States. Great stress is laid upon the use of the word "*final*" in this Section.

It is respectfully submitted that the word "*final*" as there used has no reference to and does not in any way concern itself with the matter as to whether the judgment of the Circuit Court of Appeals shall be "*final*" in the sense that it will bar a claim for refund in the case of a petition filed with the Board of Tax Appeals prior to the 1926 Act. The word "*final*" is used in Section 1005(a) where it clearly has the same meaning which it has in Section 1003(a). By no stretch of the imagination can the use of the word "*final*" in Section 1005(a) be said to contemplate a bar to a suit for refund where the petition was filed with the Board prior to the 1926 Act. Section 1005(a) provides that the decision of the Board shall become "*final*" when the expiration of the time for filing a petition for review is expired. Clearly, if no petition for review were filed in a case such as we are now discussing there would be a right to file a claim for refund. There is then no reason to attribute to the word "*final,*" in Section 1003(a), a meaning which would bar a claim for refund in the class of cases we are discussing.

Of course it could not be argued that the judgment of the Circuit Court of Appeals, in passing upon a decision of the Board, is final for the reason that the matter there determined could not, on ordinary principles of *res adjudicata,* be relitigated in a subsequent proceeding. Such an argument would assume the jurisdiction of the Circuit Court

of Appeals and the finality of its judgment as against any subsequent claim or suit for refund, whereas this is the very point in issue.

The same reply may be made to the possible suggestion that an amount paid by a taxpayer after a judgment of the Circuit Court of Appeals upon review of the Board's decision cannot be considered an *"overpayment"* within the meaning of section 284(a) because it is made in accordance with a final court decision. This argument again assumes the very point in dispute. If the decision is not a bar to a subsequent claim for refund, it does not prevent a payment from being an *"overpayment"* if it is in excess of the tax properly due.

It is urged in one of the briefs filed with this Court that the exception from the operation of Section 284 (b) contained in Section 283 (b), applies only to issues not actually raised before the Board. But, according to our understanding, it is true (as the author concedes) that all cases heard after the 1926 Act are heard and decided *under exactly the same procedure and on exactly the same basis*, as cases filed after the 1926 Act. We understand that the total tax liability for the year is in issue as much in cases *heard* after the 1926 Act as in those *filed* after the 1926 Act. In all cases *filed* after the 1926 Act all issues with reference to the year's taxes must be raised or the matter becomes *res judicata* just as if they had been raised. What reason is there for saying that Section 283(b) is to be so construed as to relieve from the principle of *res judicata* as to those issues which might have been raised and were not, but does not relieve from that principle as to issues which were raised? We submit that there is nothing to justify such construction of the exception.

It is urged in the brief above referred to that the mere absence of a prohibition against suit in a matter which has

already been litigated gives rise to no affirmative right. This is not the situation which exists under the 1926 Act with reference to petitions filed with the Board prior to its passage. We have in Section 283 (b) an express exception from a prohibition, which prohibition is made applicable to all future cases. This compels the conclusion of the grant of an affirmative right just as if it were expressly stated.

We have construed this statute without reference to the legislative history. We respectfully submit that the language of the statute is too clear to require a consideration of the legislative history. If, however, this Court feels that there is any doubt or ambiguity in the words of the statute this doubt is entirely removed by reference to the report of the Senate Committee which, in reporting Section 283(b) of the Act to the Senate, expressly called attention to the fact that the right to file a claim for refund was sill open after an appeal from the Board's decision to the Circuit Court of Appeals and a review by this Court. The report said:

> "But it should be noted that the taxpayer, despite his appeal to the Board, is not barred from suit for refund. If he takes advantage of the *appeal to the Court it is not likely that he will bring suit for refund after the Supreme Court has decided against him on his appeal from the Board.*"

The Committee would hardly have stated that a taxpayer was "*not likely*" to bring suit for refund, unless it clearly recognized that he had the legal right to sue for refund, notwithstanding the judgment of the Circuit Court of Appeals. It is also clear from the language of the Committee Report that the Committee had in mind the possibility of the same issues which had been tried before the Board being raised in a suit for refund. The decision of the courts on

altogether different issues would not have any great tendency to deter future suits.

4. IF THE CIRCUIT COURT OF APPEAL'S DECISION WERE FINAL IT WOULD IN MANY CASES BE POSSIBLE FOR THE COMMISSIONER OF INTERNAL REVENUE TO DEPRIVE TAXPAYER OF THE RIGHT OF A SUIT UPON CLAIM FOR REFUND IN SPITE OF THE EXPRESS GUARANTEE OF THE REVENUE ACT OF 1926.

In one of the briefs filed with this Court in support of jurisdiction it is admitted that it would not have been fair to deprive the taxpayer who had filed his petition under the 1924 Act of his right to a suit for refund. It was there stated that the *primary purpose* of the Section 283(b) was to permit the taxpayer in this class of cases to exercise his option after the decision by the Board; that is, then to determine whether he preferred to pay the tax and sue for refund or obtain a review in court of the board's decision.

This argument seems to us to overlook the possibility that the Commissioner may himself have the Circuit Court of Appeals review the decision of the Board which may be distasteful to him in certain respects. Section 1001(a) of the 1926 Act gives the Commissioner the same right to a review by the Circuit Court of Appeals as is given to the taxpayer. The taxpayer has no means of preventing the Commissioner seeking such a review. When the Commissioner does secure this review and decision is rendered in favor of the Commissioner and against the taxpayer, will the taxpayer thereby be deprived of the right which Congress took such pains to preserve to him? Or is it to be suggested that the decision of the Circuit Court of Appeals on the review of a decision of the Board of Tax Appeals in a case filed with the Board prior to the 1926 Act is to be final, so as to bar claims or refund, where the appeal is taken by the taxpayer, but is not to be final where the ap-

peal is taken by the Commissioner? We do not believe that anyone would seriously make this suggestion. If the decision of the Circuit Court of Appeals is final in the one case, it is final in the other. If it is final, it lies within the power of the Commissioner in every case where any portion of the decision is against him to render nugatory all the provisions of the Act designed to preserve to the taxpayer his right to file claim for refund and sue thereon.

IV.

CONCLUSION.

It is respectfully submitted in conclusion that Congress clearly provided, in cases of appeal to the Board of Tax Appeals prior to the 1926 Act, that the decision of the Board is not final and that no affirmance of that decision on a review by the Circuit Court of Appeals is final so as to bar claim for refund or suit thereon. There is here presented no case to which the jurisdiction of the Circuit Court of Appeals can extend.

Respectfully submitted,

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FILED
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CL

NO. 130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

OLD COLONY TRUST COMPANY, ET AL.,
Executors,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Certificate From the United States Circuit Court of Appeals for the First Circuit.

BRIEF AS AMICUS CURIAE BY LEAVE OF THE COURT.

JAMES WALTON,
Amicus Curiae.

Pittsburgh, Penna.,
February 11, 1929.

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IN THE SUPREME COURT OF THE UNITED STATES.

OLD COLONY TRUST COMPANY, ET AL., Executors, v. COMMISSIONER OF INTERNAL REVENUE	October Term, 1928.

Motion for Leave to File Brief as Amicus Curiae.

Comes now, James Walton, Esquire, of Pittsburgh, having received the permission of counsel for the plaintiffs herein, and respectfully moves the court for permission to file a brief as *amicus curiae* in the above cause.

JAMES WALTON.

Pittsburgh, Penna.,
February 11, 1929.

IN THE

Supreme Court of the United States

NO. 130

OCTOBER TERM, 1928.

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BRIEF AS AMICUS CURIAE BY LEAVE OF THE COURT.

I.

IS THERE, AS A MATTER OF LAW, A PETITION FOR REVIEW OF A DECISION OF THE BOARD OF TAX APPEALS OF WHICH AN APPELLATE COURT WILL OR SHOULD TAKE JURISDICTION?

Considering this question we must first determine—

WHAT THE BOARD OF TAX APPEALS IS.

"The statute leaves no room for doubt as to the solemn nature of the function of the Board. It is not merely a newly created higher division of the Bureau or even of the Treasury Department. It is, in the language of the statute, 'an *independent agency*

in the executive branch of the government.' * * * Witnesses are to be heard, and if necessary compelled by subpoena to testify; oaths are to be administered; papers and books introduced in evidence, and depositions taken. These are not the attributes of an administrative office. They give us the picture of a judicial tribunal."

Speech of Hon. Chas. D. Hamel, former president of the Board of Tax Appeals, on Sept. 12, 1924, in Detroit, Mich.

"The board constitutes an impartial tribunal of experts, independent of the Treasury Department, readily available for the determination of tax liabilities as between the Government and the taxpayer."

p. 17, Report of Committee on Ways and Means of the House on the Revenue Bill of 1926.

"The board constitutes an impartial tribunal of experts, independent of the Treasury Department, readily available for the determination of tax liabilities as between the Government and the taxpayer."

p. 34, Report of Senate Finance Committee on Internal Revenue Bill of 1926.

"It seems to me that the Board is at one of the milestones of its career. It has passed from the chrysalis of being a mere administrative agency of the Treasury Department, and has gotten along the road to its future status as a court, and whether it reaches the maturity of a full fledged butterfly depends wholly I think on the way that it comports itself in the immediate future. I have felt often as I have watched the functioning of the Board in its early stages that it had a little too much of the Bureau of Internal Revenue spirit about it, and I am speaking with full respect for that Bureau."

Extract of speech from Senator David A. Reed of the Senate Finance Committee at the dinner in honor of the members of the United States Board of Tax Appeals at the Willard Hotel, Washington, D. C. on May 26, 1926.

"The Board is an instrument of the Government, established to make inquiries and determinations between a citizen and his government in tax matters."

Chicago Railway Equipment Co. v. Blair, Com., U. S. C. C. A., 7th Circuit, decided July 2, 1927.

"The Board of Tax Appeals is a tribunal of limited jurisdiction, and its powers are strictly confined to those affirmatively vested in it by the Act under which it was enacted. * * * Its power over income tax deficiencies is restricted to the hearing of appeals from determinations made under Section 274."

Appeal of C. L. Green, 2 B. T. A. 149, June 24, 1925.

II.

JURISDICTION OF THE BOARD OF TAX APPEALS.

It is provided by section 274 (b) of the 1926 Act that the Commissioner cannot assess or collect by distraint or proceeding in court an alleged deficiency in tax or any part thereof disallowed by the Board. But nowhere, is there any jurisdiction conferred upon the Board to enforce the payment of any deficiency which it may find. The collection of the deficiency is solely in the hands of the Commissioner. The Board does not render a judgment, nor aid the Commissioner in any way.

The Board may determine an overpayment (sec. 284 (e) of 1926 Act) but is left without jurisdiction and

powerless to enforce such determination. By section 284 (d) (2) provision is specifically made for the bringing of suits by a taxpayer for the recovery of overpayments determined by the Board. So the Board is thus powerless to enforce its decisions of either deficiency due the United States or overpayment due the taxpayer.

Moreover, there are no statutory provisions as to how, by whom and from what funds the Board's determination of overpayments by taxpayers are to be made and met. As in decided contrast, note the specific statutory provision for payment of judgments awarded taxpayers by Federal Courts—

> *Payment of judgments of Court of Claims.*—In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. (R. S. s. 1089; Act Mar. 3, 1863, c. 92, s. 7, 12 Stat. 766).
>
> *Execution not to issue against officers of revenue in cases of probable cause.*—When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so re-

covered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. (R. S. s. 989; Act Mar. 3, 1863, c. 76, s. 12, 12 Stat. 741).

III.

BOARD OF TAX APPEALS HAS NO JUDICIAL POWER TO COMPEL THE ATTENDANCE OF WITNESSES.

Nowhere, neither in the 1924, the 1926, or the 1928 Revenue Act, is any power conferred upon the Board of Tax Appeals to compel the attendance of witnesses. It is true that the Board has been given authority to issue subpoenas, (sections 908 and 909 of the Revenue Act of 1926, unchanged in the Revenue Act of 1928). But there is lacking the conferring of the judicial power to punish for contempt if the subpoena is flouted.

> "The Board has no power to punish or fine a person summoned before it or elsewhere by subpoena if he fails to honor such summons."
>
> *Holmes and Brewster's Federal Tax Appeals*, (1927), p. 156.

It is true that section 1114 (a) of the Act of 1926 provides that it shall be a misdemeanor for any person to fail or refuse to supply information "for the purposes of the computation, assessment, or collection of any tax imposed by this act." Observe that it refers exclusively to tax imposed by the Act of 1926. Further, in any event, it is a criminal statute and could only be resorted to by information or indictment, together with a trial by jury in the proper Federal court. How can it be said that any tribunal, unable to compel the attendance of witnesses, is such a court from which there may be an appeal to the respective Circuit Courts of Appeal or the Supreme Court of the United States.

That the Board of Tax Appeals is without power to compel the attendance of witnesses is further confirmed by section 617 (a) of the Act of 1928. In this section specific jurisdiction to compel the attendance of witnesses is conferred upon the respective District Courts of the United States. It is significant that no similar jurisdiction is conferred upon the Board of Tax Appeals.

The history of the case of *Oesterlein Machine Co. v. Blair, Commissioner,* in the Supreme Court of the District of Columbia and in the Court of Appeals of the District of Columbia, (17 Fed. (2d), 663), and in the United States Supreme Court, decided Nov. 21, 1927, illustrates the impotency of the Board of Tax Appeals to compel the attendance of witnesses.

IV.

THE ATTITUDE OF THE FEDERAL COURTS RESPECTING THE EXTENT OF THE JURISDICTION OF THE BOARD OF TAX APPEALS.

In the case of *U. S. ex rel. McCandless v. Board of Tax Appeals,* October 14, 1927, the Supreme Court of the District of Columbia granted a peremptory writ of mandamus commanding the Board to proceed according to law in a number of particulars in which the Court held their actions were illegal. In *Mertz v. Mellon, Blair, Commissioner and Tait, Collector,* January 20, 1928, the same court enjoined the three defendants from attempting to force collection of an alleged deficiency determined by the Board in spite of the inhibition in section 3224 Revised Statutes. Regardless of the merits of these two decisions, they illustrate that the Federal Courts recognize that the Board is not a court proper and at least some distance from it.

V.

THE COMMISSIONER HAS POWER TO WITHHOLD JURISDICTION FROM THE BOARD OF TAX APPEALS.

By section 274 (a) of the 1926 Act, unchanged in the new Act, it is provided that the Board of Tax Appeals may not interfere with the Commissioner if he chooses to proceed under sections 279, 282 or 1001. Section 282 relates to bankruptcy or receivership cases and 1001 refers to cases of failure or neglect of the taxpayer to file a bond on appeal.

But section 279 provides (as very properly must be provided) that the Commissioner may proceed to immediate summary assessment and collection if he "believes that the assessment or collection of a deficiency will be jeopardized by delay". In such event the only way the jurisdiction of the Board can be resurrected is by the taxpayer filing a bond with the Collector "not exceeding double the amount" of the jeopardy assessment. The Commissioner, under this section 279, is given broad power to do just about anything he thinks is necessary. All of this is proper to protect the Government's taxes due. But the point is that it is thus within the power of the Commissioner, who is always one of the parties litigant before the Board, to deprive the Board of jurisdiction any time he chooses, up to the time the Board decides what the deficiency may be, merely by "believing the assessment or collection will be jeopardized by delay." Certainly a tribunal whose jurisdiction is so precarious and is limited by what one of the parties litigant may choose to "believe", is a long way from a court proper.

> "The contention of the plaintiff that, through the filing of a petition with the Board of Tax Appeals within 60 days after notice, he thereby obtained a stay until the final decision of the Board is untenable.

The plain intent and meaning of the provisions of section 274 and section 279 of the Revenue Act of 1926 is that, if a jeopardy assessment is made without notice, the Commissioner shall mail the notice within 60 days after making the assessment; that the taxpayer has 60 days after notice within which to file his petition with the Board of Tax Appeals but the pendency of his petition does not operate as a stay and the only manner in which a stay may be obtained is through filing the bond under section 279 (f) within 10 days after notice."

Abraham Salikoff v. Blakely D. McCaughn, Collector, D. C. E. D. Penna., No. 4265, Jan. 31, 1928.

VI.

WHAT WILL THE SUPREME COURT SAY WHEN ASKED TO REVIEW A DETERMINATION OF THE BOARD OF TAX APPEALS?

The dimensions and limitations of the Board, now fully understood, it will be pointed out what the Supreme Court had done when heretofore asked to take jurisdiction of appeals or petitions for review from tribunals powerless to render enforceable judgments. Without comment the leading case upon the question is cited below.

Act of Mar. 3, 1863, creating Court of Claims,—

The 7th section provides that in all cases of final judgment by the Court of Claims, or, on appeal, when affirmed by the Supreme Court, in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims * * *.

The 14th section provides that no money shall be paid out of the Treasury for any claim passed upon

by the Court of Claims, till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

The existence of this Court (Supreme Court) is, therefore, as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States. No appeal is given from its decisions, *nor any power given to the legislative or executive departments* to interfere with its judgments or processes of execution * * *. The jurisdiction and judicial power being vested in the court, (Supreme Court) it proceeded to prescribe its processes and regulate its proceedings according to its own judgment, and *Congress has never attempted to control or interfere with the action of the court in this respect.* * * * Nor can Congress authorize or require this Court (Supreme Court) to express an opinion on a case where its judicial power could not be exercised, and *where its judgment would not be final and conclusive* upon the rights of the parties, and process of execution awarded to carry it into effect. * * *

It is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court *exercising independently* the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court. * * * The court has uniformly refused to take jurisdiction where there was not a court of the United States in existence, in possession of the original record, to which we were authorized by law

to send a mandate to carry into effect the judgment of this court.

Gordon v. U. S. per curiam judgment, Mar. 9, 1865, 69 U. S. 561, opinion by Taney, C. J., is found in 117 U. S. 697, published 1885.

Note—On Mar. 17, 1866 Congress repealed section 14, removing the restricted jurisdiction of the Court of Claims and the restricted appellate jurisdiction of the Supreme Court.

VII.

THE BOARD BY ITS OWN RULES RECOGNIZES THAT IT IS NOT A COURT.

By its rule numbered (2) two, the Board has provided—

"The following classes of persons whom the Board finds, upon consideration of their applications, to be of good moral character and to possess the requisite qualifications to represent others may be admitted to practice before the Board:

(a) Attorneys at law * * *.

(b) Certified public accountants duly qualified under the law of any State or Territory or the District of Columbia."

What does this court say to a proposal to have a direct review by a Circuit Court of Appeals (and ultimately by the U. S. Supreme Court) of questions of law in a proceeding which may not even have been conducted by attorneys at law. What will likely happen to the taxpayers? Granting to certified public accountants full credit for knowledge of the tax laws, how can it be expected that they will know the rules of evidence, legal procedure and how to protect themselves and their client

in the record. The writer now has a case tried before the Board by a most capable certified public accountant. A dreadful miscarriage of justice resulted. But on examination of the record it was found that not one single exception had been taken to the rulings of the Board on the admission and exclusion of evidence or to any other ruling. Thus no petition for review was possible,—there was nothing upon which to base it. What is the Supreme Court going to say when it is asked to take jurisdiction of a case tried by a civilian practitioner?

VIII.

CONCLUSION UNESCAPABLE.

By section 900 of the Revenue Act of 1926 it is specifically provided that

> "the Board of Tax Appeals is hereby continued as an independent agency in the Executive Branch of the Government."

Never, in the history of jurisprudence in this country, has there been such a thing as an appeal or a review direct from a branch of the executive department to a tribunal of exclusive appellate jurisdiction in the judicial department of our government. The only possible way to enforce, or, on the other hand, restrain the act of an executive official, if it be illegal, is by an appropriate procedure in a federal court of primary or original jurisdiction. But, it evidently was neither the design nor intent of Congress in creating the Board of Tax Appeals, to give them any greater jurisdiction than to merely temporarily stay the hand of the Commissioner from enforcing the collection of a tax by distraint and seizure of the taxpayer's property, until a hearing and decision on the merits could be had before the Board. The Board itself concedes this—

> *"The Board was created to give the taxpayer a*

chance to have an open and neutral consideration of his liability for a deficiency before he is required to pay. The harsh rule of payment first and litigation afterwards was sought to be mitigated." * * *

Appeal of Everett Knitting Works, 1 B. T. A. 6, Sept. 9, 1924.

The conclusion is therefore unescapable that no federal court of exclusive appellate jurisdiction can properly and legally entertain an appellate proceeding from this Board.

IX.

THE CONSTITUTION OF THE UNITED STATES READS.

ARTICLE III.

Sec. 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *.

Sec. 3. * * * In all other cases (except cases of original jurisdiction) before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, * * *.

The judicial interpretation of these particular sections of Article III of the Constitution is taken from Volume 11, Federal Statutes Annotated, Second Edition, pages 80, 81, 82 and 83.

"The Supreme Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress."

Gordon v. U. S., (1864) 117 U. S. 704 (Appendix).

"The courts have no general supervising power over the proceedings and action of the various administrative departments of government."

Keim v. U. S., (1900) 177 U. S. 293, 20 S. Ct. 574, 44 U. S. (L. ed.) 774, affirming (1898) 33 Ct. Cl. 174.

See also

Georgia v. Stanton, (1867) 6 Wall. 71, 18 U. S. (L. ed.) 721;

Astrom v. Hammond, (1842) 3 McLean (U. S.) 107, 2 Fed. Cas. No. 596.

"*In reviewing the action of the Interstate Commerce Commission*, while the courts may review the question of the power of the commission to make an order in a particular case, they cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon some conception as to whether the administrative power has been wisely exercised."

Interstate Commerce Com. v. Illinois Cent. R. Co., (1910) 215 U. S. 452, 30 S. Ct. 155, 54 U. S. (L. ed.) 280.

"Congress may provide for the review of the action of commissions and boards created by it, exercising only quasi-judicial powers, by the transfer of their proceedings and decisions, *denominated appeals for want of a better term*, to judicial tribunals for examination and determination *de novo*."

Stephens v. Cherokee Nation, (1899) 174 U. S. 477, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041.

"An Act of Congress, in order to carry out the provisions of a treaty, authorized the judgment of the superior courts established at St. Augustine and Pen-

sacola respectively to receive and adjust all claims arising within their respective jurisdictions agreeably to the provisions of the treaty, and by a further special law authorized the district judge of the United States for the northern district of Florida to receive and adjudicate the claims of certain persons. It was held that such a tribunal was not a judicial one and that the Act of Congress did not intend to make it one, nor were the powers exercised by the district judge judicial in their nature, and such a proceeding could not be reviewed by the United States Supreme Court."

U. S. v Ferreira, (1851) 13 How. 48, 14 U. S. (L. ed) 42.

See also

Muskrat v. U. S., (1911) 219 U. S. 346, 31 S. Ct. 250, 55 U. S. (L. ed.) 246.

"The Act of Congress creating the interstate commerce commission has not attempted to confer upon the courts nonjudicial functions. A court is not made, by the Act, the mere executioner of the Commissioners' order or recommendation so as to impose upon the court a nonjudicial power. A suit is, under the provisions of the Act, an original and independent proceeding in which the commission's report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo,* upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. 614.

X.

THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS OVER ORDERS OF THE FEDERAL TRADE COMMISSION, INTERSTATE COMMERCE COMMISSION AND FEDERAL RESERVE BOARD AS CONTRASTED WITH NO MENTION OF THE BOARD OF TAX APPEALS.

By the Act of February 13, 1925 (note that this more than eight months after Congress created the Board of Tax Appeals), the Judicial Code was amended to read as follows:

> "(e) The Circuit Courts of Appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914."
>
> *Sec. 128, J. C.* par fifth.

The significant part of this is nothing is said concerning any jurisdiction over the Board of Tax Appeals. Obviously, if particular and special legislation is necessary to confer appellate jurisdiction on the Circuit Court of Appeals to enforce, set aside or modify the orders of the Commissions and Boards named in this section 128, fifth (e), a similar particular and special act of Congress would be necessary to vest the Circuit Court of Appeals with appellate jurisdiction over the Board of Tax Appeals. This seems too plain for argument.

In contrast, note the correlated section of the Revenue Act of 1926—

> "Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.
>
> (b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

The significant thing is the omission of the word "enforce" and the further words "set aside". Perhaps this might be explained by saying that since the Board of Tax Appeals is powerless to enforce its own orders and determinations, it must follow per force that the appellate body above the Board of Tax Appeals would likewise be impotent to enforce its determinations.

XI.

NO CHANGE OF VENUE FROM THE BOARD OF TAX APPEALS.

Another most serious objection to the constitutionality of the acts and the enforcement of the determinations of the Board of Tax Appeals is the fact that some (12) twelve of the (16) sixteen members were former employees of the Bureau of Internal Revenue. And the Commissioner of Internal Revenue, the head of the Bureau, is always one of the parties litigant before the Board. There is no pro-

vision for a change of venue. It seems to be possible for a taxpayer to be required to try a case before a Board member (only one member hears cases except in extraordinary cases) who previously has ruled against the taxpayer while in the employ of the Commissioner. Certainly such a thing would nullify the action of a regularly constituted court. Moreover, it is a most cogent objection. especially when it is considered that the statute seems to contemplate that the review of Circuit Courts of Appeal shall be confined to questions of law, as held in *Avery v. Blair, Commissioner,* 5th C. C. A., Nov. 1, 1927, 22 Fed. (2nd) 6.

XII.

FAR FROM BEING A COURT.

It cannot be contended that, by the creation and continuance of the Board of Tax Appeals, Congress created, or intended to create a court. On the contrary, Congress expressly places the Board under the executive department of the government. The only party who is permitted to appeal is the complaining taxpayer and the only adverse party is the Commissioner. The Board cannot order or even consider the advisability of making others parties to the proceedings before it, and whose absence might, under a given state of facts, cause an entirely different decision to be made. Compare *Shield v. Barrow,* 7 How. 130. The Board cannot issue any equitable writs necessary to do complete justice; it cannot order an accounting; it cannot martial assets; it cannot cancel deeds or other written instruments, the cancellation of which may be absolutely necessary to complete justice. In short, it can in no way function as a court either of law or equity. Yet it is now proposed that there may be an appeal or petition for review,—call it what you like,—direct from this executive agency in the government to an appellate court in the

judicial department. The one single solitary function of this Board is to determine the correct amount of the tax, and not one step beyond that can it go. It gives the Commissioner no aid in collection, nor does it give the taxpayer any aid if it determines a refund.

XIII.

ALREADY THE SUPREME COURT HAS MADE A STRONG INTIMATION OF ITS VIEWPOINT.

While this court has not said so in so many words, the language used in the case of *Williamsport Wire Rope Company v. United States,* number 337, October 1927 Term, decided June 4, 1928, 277 U. S. 551, strongly impels the conclusion that the United States Board of Tax Appeals is recognized to be nothing more than a branch of the executive department of the government. For convenience, the relevant portion of that decision is cited as follows—

> It is true that, unlike the Committee (on appeals and review) the Board of Tax Appeals is not a part of the Bureau of Internal Revenue. The Board is an independent agency. But by specific provision of the Revenue Act of 1924, c. 234, No. 900 (k), 43 Stat. 253, 338, it was defined as an agency "in the executive branch of the Government." Compare *Goldsmith v. Board of Tax Appeals,* 270 U. S. 117, 121-122. *Its sole function* consists in reviewing, on appeal, determinations of the Commissioner under the revenue laws. The fact that the Commissioner is a party to all cases before it enables the Board, by rules of procedure which it has developed, to leave to the Commissioner the initial determination of many questions requiring the use of facts not in the record. Its limited, specialized functions enable its members to acquire the extensive special knowledge and the specific experience essential to a sound exercise of judgment in dealing

with questions arising under Nos. 327 and 328. As was said in the *Oesterlein case, supra,* at p. 226, there is no reason for thinking that Congress considered the Commissioner to be better qualified for making determinations under Nos. 327 and 328 than this administrative agency specially established to review his decisions.

XIV.

TO ASSUME JURISDICTION WILL MAKE THE DECISIONS OF THIS COURT UTTERLY IRRECONCILABLE.

In *Blair, Commissioner v. Oesterlein Machine Company,* 275 U. S. 220, (1927), this court said, in effect that the Board of Tax Appeals did have jurisdiction to hear an appeal from the determination of the Commissioner under Sections 327 and 328 of the 1918 Revenue Act. In *Williamsport Wire Rope Company v. United States,* (1928), 277 U. S. 551, this court affirmed that conclusion but went on to say that a federal court had no jurisdiction in such cases whatsoever, since determinations under these particular sections were discretionary with the Commissioner, subject only to an appeal to the Board. If that be true, how, then, can there be a review by an appellate federal court of a decision by the Board of Tax Appeals in a case involving sections 327 and 328. The reasoning of this court for lack of jurisdiction in Williamsport will apply with equal force and effectiveness when a case like Oesterlein, for instance, comes before it by way of the Board of Tax Appeals. And if there can be no review by this court from a decision of the Board in a section 327 and 328 case, how can there be a distinction made in cases involving other sections of the Revenue Acts. The statute makes no distinction whatsoever.

XV.

All that has been said heretofore applies with equal relevancy to cases which were appealed to the Board under either the 1924 Act or the 1926 Act. But the two acts are distinctly different. Sections 283 (b) and 283 (f) (set forth on pages 7 and 8 of the Solicitor General's brief) of the 1924 Act, specifically provide that a taxpayer's right to pay and then institute suit to recover shall not be forfeited by an appeal to the Board. And it has twice been so interpreted by the District Courts,—first, in *Emery v. U. S.*, 27 F. (2nd) 992, (one of the writer's cases) and again in *Old Colony R. Co. v. U. S.*, 27 F. (2nd) 994, (Mass.). So, if this court takes jurisdiction and decides the issues herein, the taxpayer will then pay his tax, institute suit for recovery and, with a jury trial, the result might easily be the converse. And further, this same identical case might thus come to this court a second time under a record upon which the former decision would have to be reversed.

XVI.

ON THE SUBJECT OF CONFUSION AND EXPEDIENCY.

In the brief of the learned Committee of the American Bar Association, it is pointed out that a denial of jurisdiction will result in much confusion and that present results have been satisfactory (p. 5). Consider then for a moment what is happening right now in our courts,—what actually did happen in the *Emery v. U. S.* case, cited *supra*. The taxpayer claimed a refund and the Commissioner claimed additional tax. The taxpayer instituted suit in the District Court for his refund and the Commissioner concurrently determined a deficiency of a vast amount of additional tax. From this determination of the Commissioner the taxpayer appealed to the Board of Tax Appeals, which

eventually held there was no additional tax due. Thereupon the taxpayer renewed his suit for refund in the District Court and was awarded a judgment. The Commissioner's counsel did not appeal therefrom, but subsequently did file a petition for review of the decision of the Board of Tax Appeals in the Circuit Court of Appeals for the Third Circuit. Thus we have the same controversy pending in two different courts with a possibility that one court may be obliged to decide one way and the other court, with an utterly different record before it, will be obliged to decide the other way. And the Third Circuit Court of Appeals might find itself in the anomalous position of having to decide the suit for refund, when it is reached, entirely opposite to the decision on appeal from the Board of Tax Appeals. Shall we say that such a result is satisfactory? And could there be greater confusion and chaos?

Respectfully submitted,

JAMES WALTON,

Amicus Curiae by leave of the Court.

Pittsburgh, Penna.,
February 11, 1929.

SUPREME COURT OF THE UNITED STATES.

No. 129.—October Term, 1928.

The United States of America, *vs.* Boston & Maine Railroad. } On Certificate from the United States Circuit Court of Appeals for the First Circuit.

[June 3, 1929.]

Mr. Chief Justice Taft delivered the opinion of the Court.

As indicated in *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, No. 130, just decided, this case comes here by certificate from the Circuit Court of Appeals for the First Circuit and on the following statement:

"This action is brought by the Boston & Maine Railroad to recover income taxes for the year 1917, claimed to have been erroneously collected. In the District Court [for the District of Massachusetts] the plaintiff recovered a judgment for the full amount of its demand—$3,920.55 and interest.

"June 30, 1900, the Fitchburg Railroad Company leased all its railroad and property of every description to the Boston & Maine Railroad for the term of ninety-nine years. In the lease the lessee covenanted to pay specified rentals, to maintain and replace the leased properties in manner indicated, to pay all operating expenses, and to pay 'all taxes of every description, Federal, State, and municipal, upon the lessor's property, business, indebtedness, income, franchises, or capital stock, or said rental,' and to pay divers other charges. In 1918 an income-tax return, under the provisions of the revenue acts of 1916 and 1917, was filed on behalf of the Fitchburg Railroad Company for the calendar year 1917, upon which taxes amounting to $61,422.06 were assessed. These taxes were paid to the Commissioner of Internal Revenue by the Boston & Maine Railroad pursuant to the term of the lease. The Fitchburg Railroad Company was consolidated with the Boston & Maine Railroad in 1919.

"In 1921 the Commissioner of Internal Revenue assessed an additional income tax against the Fitchburg Railroad Company of $3,920.55. In doing this he treated the payment of $61,422.06 made by the Boston & Maine Railroad to the collector of internal revenue as additional taxable income to the Fitchburg Railroad Company

to the extent of $65,342.61. This additional tax of $3,920.55 was paid to the collector of internal revenue by the Boston & Maine Railroad in July, 1921.

"The claim for refund of this additional tax was duly filed with the Commissioner of Internal Revenue, but was never formally acted upon, and more than six months having elapsed after it was filed, this action was brought for the recovery of the tax so paid [under par. 20, Section 24 of the Judicial Code, as amended by Sec. 1310(c), c. 136, 42 Stat. 310]."

The judgment of the District Court was appealed to the Circuit Court of Appeals for the First Circuit, and upon the facts recited, and under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, the Court of Appeals has asked the instruction of the Supreme Court upon the following question:

"Did the payment by the lessee of the net income taxes assessable against the lessor constitute additional taxable income to such lessor?"

The merits of this case must be disposed of in accord with the rule already laid down in the *Old Colony* case just decided. Like that, it is one in which the lessee has paid to the Government the taxes due under the law from the lessor. The payment is made in accord with the contract of lease, and is merely a short cut whereby that which the lessee specifically agreed to pay as part of the rental effects that payment by discharging the obligation of the lessor to pay the tax to the Government.

Our conclusion is in accordance with the practice of the Department. Treasury Decision 2620 (19 Treas. Dec. 411). In answer to a question suggested by this Court, the Commissioner states in the appendix to the Government's brief on reargument in No. 130, that it has been the uniform practice to treat taxes paid, where by agreement between the parties the tax laid upon the income actually received by one of them has been paid by the other. He refers to the decision of the Circuit Court of Appeals for the First Circuit in the case of *West End Railway Co.* v. *Malley*, 246 Fed. 625, where the dividends paid by a lessee corporation directly to the stockholders of the lessor corporation were held to be income to the lessor under the Revenue Act of October 3, 1913. It was carried into Regulation 33, promulgated January 2, 1918, as Article 102, reading as follows:

"Art. 102. Leased properties.—When a corporation shall have leased its property in consideration that the lessee shall pay in lieu of rental an amount equivalent to a certain rate of dividends on its capital stock or the interest on its outstanding indebtedness, together with taxes, insurance, or other fixed charges, such payments shall be considered rental payments and shall be returned by the lessor corporation as income, notwithstanding the fact that the dividends and interest are paid by the lessee direct to the stockholders and bondholders of the lessor. The lessee, in making these payments direct to the bondholders and the stockholders, does so as the agent of the lessor, and the latter is none the less liable to return the amounts thus paid as income and to pay any tax that may be due thereon."

Article 102 of Regulations 33 has been substantially embodied in all subsequent regulations as Article 546, of Regulations 45, Article 547 of Regulations 62, 65 and 69, and Article 70 of Regulations 74, promulgated under the Revenue Acts of 1918, 1921, 1924, 1926 and 1928, respectively.

Article 109 of Regulations 45, promulgated January 28, 1921, reads as follows:

"Taxes paid by a tenant to or for a landlord for business property are additional rent and constitute a deductible item to the tenant and taxable income to the landlord, the amount of the tax being deductible by the latter."

This provision is also found in Article 109 of Regulations 62, Article 110 of Regulations 65 and 69, and Article 130 of Regulations 74.

In addition to the foregoing general provisions, a specific ruling on this question was published in May, 1920, as A. R. M., 16, C. B. 2, page 62. The facts in that case are stated by the Commissioner as follows:

"A contract was entered into in July, 1917, between the P Company and the M Company, whereby the latter agreed to sell certain goods on a cost-plus basis. It was provided that the P Company should pay Federal taxes assessed on the profits accrued from this contract to the M Company. Performance under the contract was made by the M Company during 1918. In October, 1918, the P Company closed its books upon an accrual basis and made no provision for any taxes arising out of the contract. It was there held that the amount of taxes of the M Company paid by the P Company was income to the M Company for the year for which such payment was made. This ruling was followed not only in the case

in which rendered, but also as a precedent in all other similar cases."

The Commissioner says that no single instance has been found where the Bureau has departed from this general practice of construing taxes paid under the present circumstances to be income to the taxpayer whose tax liability has been discharged in such a manner.

The Commissioner says that it was the purpose of the instructions to establish a consistent policy, and that if they have not been followed in individual cases, it is due to an unauthorized departure from the Bureau's instructions. More than this, it should be added that neither before nor since 1923 has any algebraic formula been used by the Bureau in computing taxes.

Not only, therefore, is the conclusion that the question must be answered "Yes" sustained by the practice of the Department under all of the Revenue Acts, but the cases cited in the *Old Colony* case require the same view.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 130.—October Term, 1928.

Old Colony Trust Company, et al., Executors, *vs.* Commissioner of Internal Revenue.	On Certificate from the United States Circuit Court of Appeals for the First Circuit.

[June 3, 1929.]

Mr. Chief Justice Taft delivered the opinion of the Court.

We have before us for consideration two questions certified from the same Circuit Court of Appeals, No. 130 and No. 129. They are presented upon different statements of facts and the cases reach the certifying court in different ways, but the questions are so nearly alike that the certifying judges deemed it convenient to present them in consolidated form. We prefer to separate the questions, discuss and decide No. 130 first, and then consider No. 129.

No. 130 comes here by certificate from the Circuit Court of Appeals for the First Circuit. The action in that court was begun by a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, before Mr. Wood's death, the Commissioner of Internal Revenue notified him by registered mail of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The deficiency was revised by the Commissioner August 18, 1925. An appeal was taken to the Board of Tax Appeals, which was filed October 27, 1925. A hearing before the Board, April 11, 1927, resulted in a decision November 12, 1927. The Board approved the action of the Commissioner and found a deficiency in the federal income tax return of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review was perfected December 23, 1927, pursuant to the Revenue Act of 1926, Sec. 283(j), and Secs.

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1001 to 1005, c. 27, 44 Stat. 9, 65, 109, and Rule 38 of the First Circuit Court of Appeals.

The facts certified to us are substantially as follows:

William M. Wood was president of the American Woolen Company during the years 1918, 1919 and 1920. In 1918 he received as salary and commissions from the company $978,725, which he included in his federal income tax return for 1918. In 1919 he received as salary and commissions from the company $548,132.87, which he included in his return for 1919.

August 3, 1916, the American Woolen Company had adopted the following resolution, which was in effect in 1919 and 1920:

"Voted: That this company pay any and all income taxes, State and Federal, that may hereafter become due and payable upon the salaries of all the officers of the company, including the president, William M. Wood; the comptroller, Parry C. Wiggin; the auditor, George R. Lawton; and the following members of the staff, to wit: Frank H. Carpenter, Edwin L. Heath, Samuel R. Haines, and William M. Lasbury, to the end that said persons and officers shall receive their salaries or other compensation in full without deduction on account of income taxes, State or Federal, which taxes are to be paid out of the treasury of this corporation."

This resolution was amended on March 25, 1918, as follows:

"Voted: That, referring to the vote passed by this board on August 3, 1916, in reference to income taxes, State and Federal, payable upon the salaries or compensation of the officers and certain employees of this company, the method of computing said taxes shall be as follows, viz:

" 'The difference between what the total amount of his tax would be, including his income from all sources, and the amount of his tax when computed upon his income excluding such compensation or salaries paid by this company.' "

Pursuant to these resolutions, the American Woolen Company paid to the collector of internal revenue Mr. Wood's federal income and surtaxes due to salary and commissions paid him by the company, as follows:

Taxes for 1918 paid in 1919.....	$681,169.88
Taxes for 1919 paid in 1920.....	351,179.27

The decision of the Board of Tax Appeals here sought to be reviewed was that the income taxes of $681,169.88 and $351,179.27 paid by the American Woolen Company for Mr. Wood were additional income to him for the years 1919 and 1920.

The question certified by the Circuit Court of Appeals for answer by this Court is:

"Did the payment by the employer of the income taxes assessable against the employee constitute additional taxable income to such employee?"

The first point presented to us is that of the jurisdiction of this Court to answer the question of law certified. It requires us to examine the original statute providing for the Board of Tax Appeals under the Revenue Act of 1924, and the amending Act of 1926.

The Board of Tax Appeals, established by Section 900 of the Revenue Act of 1924, Tit. IX, c. 234, 43 Stat. 253, 336, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment. The Board's duty under the Act of 1924 was to hear, consider and decide whether deficiencies reported by the Commissioner were right.

Section 273 of that Act defined a "deficiency" to be the the amount by which the tax imposed exceeded the amount shown by the return of the taxpayer after the return was increased by the amounts previously assessed or disallowed. There was under the Act of 1924 no direct judicial review of the proceedings before the Board of Tax Appeals. But each party had the unhindered right to seek separate action by a court of competent jurisdiction to test the correctness of the Board's action. Such court proceedings were to be begun within one year after the final decision of the Board.

Section 274 (b) provided that if the Board determined there was a deficiency, the amount so determined should be assessed and paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner, but disallowed as a deficiency by the Board, could be assessed, but the Commissioner was at liberty, notwithstanding the decision of the Board against him, to bring a suit in a proper court against the taxpayer to collect the alleged deficiency.

On the other hand, by Section 900 (g) it was provided that in any suit brought by the Commissioner, or by the taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board were *prima facie* evidence of the facts.

By the Revenue Act of 1926, this procedure was changed and a direct judicial review of the Board's decision was substituted.

The Act of 1926 also enlarged the original jurisdiction of the Board of Tax Appeals to consider deficiencies beyond those shown in the Commissioner's notice, if the Commissioner made such a claim at or before the hearing (Section 274(e)), and also to determine that the taxpayer not only did not owe the tax but had over paid (Section 284 (e)).

The chief change made by the Act of 1926 was the provision for direct judicial review of the Board's decisions by the filing by the Commissioner or the taxpayer of a petition for review in a Circuit Court of Appeals or the Court of Appeals of the District of Columbia under rules adopted by such courts.

It is suggested that the proceedings before the Circuit Courts of Appeals or the District Court of Appeals on a petition to review are and can not be judicial, for they involve "no case or controversy," and without this a Circuit Court of Appeals, which is a constitutional court (*Ex parte Bakelite Corporation,* No. 17, Original, decided May 20, 1929) is incapable of exercising its judicial function. This view of the nature of the proceedings we can not sustain.

The case is analogous to the suits which are lodged in the Circuit Courts of Appeals upon petition or finding of an executive or administrative tribunal. It is not important whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law. The jurisdiction in this cause is quite like that of Circuit Courts of Appeals in review of orders of the Federal Trade Commission. *Federal Trade Commission* v. *Eastman,* 274 U. S. 623; *Silver Co.* v. *Federal Trade Commission,* 292 Fed. 752. There are other instances of a like kind which can be cited. *United States* v. *Ritchie,* 17 How. 525, 534; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 469; *Stephens* v. *Cherokee Nation,* 174 U. S. 445,

477. See also *Fong Yue Ting* v. *United States,* 149 U. S. 698, 714.

It is not necessary that the proceeding to be judicial should be one entirely *de novo.* It is enough that before the judgment which must be final has been invoked as an exercise of judicial power, it shall have certain necessary features. What these are has been often declared by this Court. Perhaps the most comprehensive definitions of them are set forth in *Muskrat* v. *United States,* 219 U. S. 346, 356, where this Court entered into the inquiry what was the exercise of judicial power as conferred by the Constitution. There was cited there a definition by Mr. Justice Field, in *Re Pacific Railway Commission,* 32 Fed. 241, 255, which has been generally accepted as accurate. He said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter; and includes only suits of a civil nature. Chisholm *v.* Georgia, 2 Dall. 431, 432; 1 Tuch. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such [illegible]ular proceedings as are established by law or custom for the [illegible]otection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

In *Osborn* v. *United States Bank,* 9 Wheat. 738, Chief Justice Marshall construed Article III of the Constitution as follows (p. 819):

"This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in the *Bakelite* case, *supra,* and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

In the case we have here, there are adverse parties. The United States or its authorized official sues to establish its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. The courts are either the Circuit Court of Appeals or the District of Columbia Court of Appeals. The subject matter of the controversy is the amount of the tax claimed to be due or refundable and its validity, and the judgment to be rendered is a judicial judgment.

The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.

It is next suggested that there is no adequate finality provided in respect to the action of these courts. In the first place, it is not necessary, in order to constitute a judicial judgment that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect, in the way that judgments for money or for the possession of land usually are enforced. A judgment is sometimes regarded as properly enforceable through the executive departments instead of through an award of execution by this Court, where the effect of the judgment is to establish the duty of the department to enforce it. *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 457, 461. The case of *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S. 123, 132, shows clearly that there are instances where the award of execution is not an indispensable element of a constitutional case or controversy. In that decision there are collected familiar examples of judicial proceedings resulting in a final adjudication of the rights of litigants without it.

But even if a formal execution be required, we think power to resort to it is clearly shown with respect to the enforcement of the action of the courts here involved by Sections 1001 to 1005.

By the first, the decision of the Board of Tax Appeals rendered after the passage of the Act of 1926 may be reviewed by the Circuit Court of Appeals or the District Court of Appeals if a peti-

tion for such review is filed either by the Commissioner or the taxpayer within six months after the decision is rendered. The courts are to adopt rules for the filing of the petition, the preparation of the record, and the conduct of the proceedings upon such review. The review is not to operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board, unless a petition for review is filed by the taxpayer, or unless the taxpayer has filed a so-called jeopardy bond which when enforced will operate finally to settle the rights of the parties as found by the courts.

By Section 1002, it is provided in what venue the decision may be reviewed. In Section 1003, the Circuit Courts of Appeals and the Court of Appeals of the District are given exclusive jurisdiction to review the decisions of the Board and it is declared that their judgments shall be final except that they shall be subject to review by the Supreme Court of the United States, on certificate or by certiorari in the manner provided in Section 240 of the Judicial Code as amended, and in such review the courts shall have the power to affirm, or if the decision of the Board is not in accordance with law, to modify or reverse the decision of the Board, with or without remanding the case for a rehearing as justice may require.

By Section 1004, the same courts are given power to impose damages in any case where the decision of the Board is affirmed, and it appears that the petition was filed merely for delay.

By Section 1005, the decision of the Board is to become final in respect to all the numerous instances which in the course of the review may naturally end further litigation. In the provisions of these sections, the legislation prescribes minute details for the enforcement of the judgments that are the result of these petitions for review in the several courts vested with jurisdiction over them. The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest and demonstrates the unsoundness of the objection.

We have before us, however, for actual inquiry a case different from one just considered in the regular course of a petition for review of a decision of the Board, begun and decided all after the enactment of the Act of 1926. It is one in which the appeal to the Board of Tax Appeals had been taken, but the appeal had not

been decided by the Board before the passage of the Act of 1926. That presents what involves a troublesome exception or duplication in the procedure. This occurs because of the last excepting clause of Section 283 (b) of the amending Act of 1926, which is as follows:

"If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 . . . and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of Section 284."

The provisions of Section 284(d) are those which deny to the taxpayer the power to bring any suit against the United States for the recovery of the tax after he has adopted the procedure of appealing to the Board of Tax Appeals or to the Circuit Court of Appeals.

By this last exception in 283 (b), there seems still open to the taxpayers who have filed a petition under the law of 1924 and have not had a decision by the Board before the enactment of the law of 1926, the right to pay the tax and sue for a refund in the proper District Court (Par. 20 of Section 24 of the Judicial Code, as amended by Sec. 1310 (c), c. 136, 42 Stat. 311, U. S. Code, Title 28, Sec. 41). *Emery* v. *United States,* 27 F. (2d) 992, and *Old Colony R. R.* v. *United States,* 27 F. (2d) 994, hold that the petitioner still retains this earlier remedy.

The truth seems to be that in making provision to render conclusive judgments on petitions for review in the Circuit Courts of Appeals, Congress was not willing in cases where the Board of Tax Appeals had not decided the issue before the passage of the Act of 1926, to cut off the taxpayer from paying the tax and suing for a refund in the proper District Court. But the apparent conflict in such cases can be easily resolved by the use of the principles of *res judicata.* If both remedies are pursued, the one in a District Court for refund, and the other on a petition for review

in the Circuit Court of Appeals, the judgment which is first rendered will then put an end to the questions involved and in effect make all proceedings in the other court of no avail. Whichever judgment is first in time is necessarily final to the extent to which it becomes a judgment. There is no reason, therefore, in the case before us to decline to take jurisdiction. See *Bryar* v. *Campbell,* 177 U. S. 649; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 230; *Stanton* v. *Embrey,* 93 U. S. 548, 554.

Second. The jurisdiction here is based upon the certificate of a question of law. That is whether the payment by the employer of the income taxes assessed against the employee constitutes additional returnable taxable income to such employee. The certification of such a question by the Circuit Court of Appeals is an invocation of the appellate jurisdiction of this Court and therefore within the Constitution.

Third. Coming now to the merits of this case, we think the question presented is whether a taxpayer having induced a third person to pay his income tax or having acquiesced in such payment as made in discharge of an obligation to him may avoid the making of a return thereof and the payment of a corresponding tax. We think he may not do so. The payment of the tax by the employers was in consideration of the services rendered by the employee and was a gain derived by the employee from his labor. The form of the payment is expressly declared to make no difference (Section 213, Revenue Act of 1918, c. 18, 40 Stat. 1065). It is therefore immaterial that the taxes were directly paid over to the Government. The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed. The certificate shows that the taxes were imposed upon the employee, that the taxes were actually paid by him and that the employee entered upon his duties in the years in question under the express agreement that his income taxes would be paid by his employer. This is evidenced by the terms of the resolution passed August 3, 1916, more than one year prior to the year in which the taxes were imposed. The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore that the payment constituted income to the employee.

This result is sustained by many decisions. *Providence & Worcester R. R. Co.,* 5 B. T. A. 1186; *Houston Belt & Terminal Ry.*

Co. v. *Commissioner*, 6 B. T. A. 1364; *West End Street Railway Co.* v. *Malley*, 246 Fed. 625; *Rennselaer & S. R. Co.* v. *Irwin*, 249 Fed. 726; *Northern R. Co. of New Jersey* v. *Lowe*, 250 Fed. 856; *Houston Belt & Terminal Ry. Co.* v. *United States*, 250 Fed. 1; *Blalock* v. *Georgia Ry. & Electric Co.*, 246 Fed. 387; *Hamilton* v. *Kentucky & Indiana Terminal R. R.*, 289 Fed. 20; *American Telegraph & Cable Co.* v. *United States*, 61 Ct. Cl. 326; *United States* v. *Western Union Telegraph Co.*, 19 Fed. (2d) 157; *Estate of Levalley*, 191 Wis. 356; *Estate of Irwin*, 196 Cal. 366.

Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute. This is shown by the case of *Noel* v. *Parrott*, 15 F. (2d) 669. There it was resolved that a gratuitous appropriation equal in amount to $3 per share on the outstanding stock of the company be set aside out of the assets for distribution to certain officers and employees of the company and that the executive committee be authorized to make such distribution as they deemed wise and proper. The executive committee gave $35,000 to be paid to the plaintiff taxpayer. The court said, p. 672:

"In no view of the evidence, therefore, can the $35,000 be regarded as a gift. It was either compensation for services rendered, or a gain or profit derived from the sale of the stock of the corporation, or both; and, in any view, it was taxable as income."

It is next argued against the payment of this tax that if these payments by the employer constitute income to the employee, the employee will be called upon to pay the tax imposed upon this additional income, and that the payment of the additional tax will create further income which will in turn be subject to tax, with the result that there would be a tax upon a tax. This it is urged is the result of the Government's theory, when carried to its logical conclusion, and results in an absurdity which Congress could not have contemplated.

In the first place, no attempt has been made by the Treasury to collect further taxes, upon the theory that the payment of the additional taxes creates further income, and the question of a tax upon a tax was not before the Circuit Court of Appeals and has not been certified to this Court. We can settle questions of that sort when

an attempt to impose a tax upon a tax is undertaken but not now. *United States* v. *Sullivan*, 274 U. S. 259, 264; *Yazoo & Mississippi Valley R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219. It is not, therefore, necessary to answer the argument based upon an algebraic formula to reach the amount of taxes due. The question in this case is, "Did the payment by the employer of the income taxes assessable against the employee constitute additional taxable income to such employee?" The answer must be "Yes."

Separate opinion of Mr. Justice McReynolds.

The Board of Tax Appeals belongs to the executive department of the government and performs administrative functions—the assessment of taxes. The statute attempts to grant a broad appeal to the courts and directs them to reconsider the Board's action—to do or to say what it should have done. This enjoins the use of executive power, not judicial. The duty thus imposed upon the courts is wholly different from that which arises upon the filing of a petition to annul or enforce the action of the Interstate Commerce Commission or the Federal Trade Commission.

I think the Circuit Court of Appeals was without jurisdiction.

SUPREME COURT OF THE UNITED STATES.

No. 7.—October Term, 1928.

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine, etc., et al., Petitioners, vs. D. W. Michaux et al.	Certiorari to the Supreme Court of the State of Texas.

[June 3, 1929.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This case presents a controversy between two fraternal orders called Nobles of the Mystic Shrine, one having white and the other negro members. A short reference to the origin and history of these orders will conduce to an accurate appreciation of the controversy.

From early times there have been two distinct masonic fraternities in the United States, one confined to white men and the other to negroes. Each has had its local lodges, grand lodges and supreme lodge, and also several component bodies, including Knights Templar and Scottish Rite consistories. Both have existed in the same territory and have had similar names, rituals and emblems, and yet have been independent and without any interrelation. The white fraternity's existence in this country reaches back to early colonial times. The negro fraternity was organized in Boston in 1784 and afterwards was extended to other sections.

The orders called Nobles of the Mystic Shrine are relatively modern, originated in the United States and are outgrowths of the masonic fraternities just described. They were founded by masons and their membership is restricted to masons—white in one case and negro in the other—who have become Knights Templars or have received the 32d degree in a Scottish Rite consistory. The white masons were the first to establish an order of Nobles of the Mystic Shrine. They organized one in New York in 1872 for fraternal and charitable purposes. The order grew rapidly and

soon came to have local lodges, called temples, in most of the States, and also to have a national governing body called its Imperial Council. The negro masons imitatively organized a like order for like purposes in Chicago in 1893. It also grew, although not so rapidly as the white order, and came to have many local temples in other sections of the country and to have a national governing body called its Imperial Council. The constitution, emblems and regalia of the negro order, as also the titles given to the officers of its temples and council, were all adopted in imitation of those of the white order. Another feature imitatively copied was a purely fanciful claim, once put forth by the white order and afterwards discredited, to the effect that that order was an authorized extension of an ancient and illustrious order established centuries ago in Mohammedan countries.

Each of the orders, after becoming well organized, made it a practice to hold periodic national meetings attended with public parades and other features tending to bring attention to the order and to advance its extension. And, aside from such activities, each publicly engaged in commendable charitable work. The white order, by reason of its greater membership and the larger resources of its members, was able to carry that work further than the negro order could, but the contributions and efforts of the latter in that field were both helpful and substantial.

The white order always has been a voluntary unincorporated association. In 1895 the New York legislature passed a special act purporting to incorporate it, but the proffered incorporation was rejected. In 1893 the negro order was incorporated under the laws of Illinois, but that incorporation was abandoned; and in 1901 the order was incorporated as a fraternal and charitable association under the Act of Congress of May 5, 1870, providing for the creation of corporations in the District of Columbia, c. 80, § 3, 16 Stat. 98, 101.

The name adopted by the white order is "Ancient Arabic Order of the Nobles of the Mystic Shrine for North America" and that adopted by the negro order, and under which it was incorporated, is "Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine of North and South America and its Jurisdictions".

Prior to 1918 both orders established local temples in the State of Texas—in some instances in the same cities. Among the temples

of the white order were one in Dallas established in 1887, one in El Paso established in 1907 and one in Houston established in 1915. Among those of the negro order were one in Dallas established in 1894, one in El Paso established in 1902 and one in Houston established in 1917.

The present suit was begun in 1918 in a state court of Texas. Originally it was brought by members of the local temple of the white order in Houston against members of the local temple of the negro order in that city to enjoin the latter from using any imitation of the name, constitution, titles, emblems and regalia of the former. But through the voluntary intervention of other parties and a voluntary enlargement of the original pleadings—all with the court's leave—the suit was broadened into one between the two national orders wherein the white order sought an injunction against the negro order restraining and preventing the latter, its lodges, officers and members, "throughout the State of Texas and the entire United States", from further using the name under which it was acting, from designating its local lodges as "temples", from designating its members as "Nobles" or "Shriners", from giving the officers of its lodges and council the titles of like officers in the white order, from using a constitution, emblems and regalia like those of the white order and from organizing or instituting lodges in imitation of those of that order.

The answer of the negro order may be summarized as denying that the white order had acquired any exclusive or superior right to use the name, constitution, designations, titles, emblems and regalia before mentioned or any of them; denying that the negro order's use of such name, constitution, designations, titles, emblems and regalia was with any wrongful or fraudulent purpose, or was other than the exercise of a right belonging to that order as a lawfully constituted fraternal and charitable association; setting up the negro order's incorporation in 1901 under the Act of Congress of May 5, 1870, and asserting that in virtue of that act and such incorporation the order became entitled, if not theretofore entitled, to use the name which it had been and was still using, to adopt and have a constitution, to establish and have local lodges, to select and use appropriate emblems and regalia, and to do other things properly incident to the maintenance of a fraternal and charitable order; alleging that its acts and practices were all

within its rights under that incorporation; asserting that there had been and was no competition between the two orders and that the white order drew its members wholly from the white masonic fraternity while the negro order drew its members wholly from the negro masonic fraternity; and setting up that the white order by reason of its laches and its acquiescence in the acts and practices of the negro order was without right to an injunction or other equitable relief.

On a trial of the issues the court made special findings of fact, stated its conclusions of law and entered a decree awarding to the white order all of the relief sought. The findings of fact included one to the effect that the imitative acts and practices of the negro order constituted "a fraudulent deception" injurious to the white order; and another to the effect that the white order had not acquiesced in those acts and practices and was not chargeable with laches in not taking earlier steps to stop them. The conclusions of law and the decree are copied in the margin.[1] The decree was affirmed by the Court of Civil Appeals, 273 S. W. 874, and by the Supreme Court of the State, 286 S. W. 176. The negro order then petitioned this Court for a review upon writ of certiorari and the petition was granted.

In the state appellate courts the negro order relied on the Act of Congress of May 5, 1870, and its incorporation thereunder, just as it had done in the trial court, and also insisted that the decree

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[1] CONCLUSIONS OF LAW.

I.

The plaintiffs, and the plaintiff intervenor, and the other plaintiff intervenors herein being first in time to use and adopt the constitution and laws, the regalia, paraphernalia, jewels, badges, head covering, titles of officers, names of subordinate organizations, and names of members in North America or elsewhere, and having used same continuously for more than fifty (50) years are entitled to an injunction restraining the use thereof by the defendants and the defendant intervenor, and this regardless of whether plaintiff intervenor is incorporated or exists, and was existed, as a voluntary unincorporated, fraternal, benevolent or social organization.

II.

The plaintiff, plaintiff intervenor, and the other plaintiff intervenors herein having established their legal right to the injunction, and the injury which will accrue to them if an injunction is denied being a continuous injury and wrong, the injunction may issue notwithstanding the facts may disclose delays in seeking relief.

against it was not in accord with the decision of this Court in *Creswill* v. *Knights of Pythias*, 225 U. S. 246, where like privileges asserted under that act of Congress by a fraternal and benevolent association incorporated thereunder were involved.

III.

The intentional use by the defendants and defendant-intervenor of the constitution and laws, titles of officers, regalia, paraphernalia, jewels, emblems, badges, pins, head covering, names of subordinate organizations, and names of plaintiff, plaintiff-intervenor, and the other plaintiff-intervenors herein by a literal appropriation thereof is a fraud, being used as a fraud as against plaintiffs, plaintiff-intervenor, and the other plaintiff-intervenors herein, and constitutes a continuing wrong, demanding a judicial interposition by the issuance of an injunction and mere delay or even acquiescence cannot defeat the remedy, unless such delay has been continued so long and under such circumstances as to defeat the right itself, and the facts in this case do not show such delay, or laches, as would constitute a defense to the issuance of the injunction herein.

IV.

The plaintiff, the plaintiff-intervenor, and the other plaintiff-intervenors herein have not been guilty of such laches or delay, or acquiescence as to defeat their right to the issuance of the injunction.

DECREE.

Wherefore it is ordered, adjudged and decreed by the Court that the individual defendants and each of them, and the defendant, "Doric Temple [Houston] of the Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine of North and South America and its Jurisdictions" and the officers and membership thereof; and the defendant intervenor, "Ancient Egyptian Arabic Order Nobles of the Mystic Shrine of North and South America and its Jurisdictions" and each and all of its officers and members and their associates, confederates and successors in office; and each and all of the "Temples" thereof, and their officers and membership throughout North America be perpetually restrained and enjoined from:

I.

Using the name "Ancient Egyptian Arabic Order Nobles of the Mystic Shrine of North and South America and its Jurisdictions" or any other name, the distinctive words of which are a colorable imitation of the name "Ancient Arabic Order of the Nobles of the Mystic Shrine for North America" and from using any of the distinctive words in said name and particularly the distinctive words "Ancient Arabic" and the distinctive word "Nobles" and the distinctive words "Mystic Shrine" or any colorable imitation of either of them, as the name or part of the name of any society or organization, corporate or otherwise.

II.

From using the name "Temple" or any colorable imitation thereof as the designation of any organization either governing or subordinate, of any society or organization, corporate or otherwise.

The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this Court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing

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III.

From organizing, undertaking to organize or maintaining directly or indirectly, or in any manner encouraging the organization or maintenance anywhere throughout the North American, or any governing body under the name of "Imperial Council" or any colorable imitation thereof; or any subordinate body under the name of "Temple" or any colorable imitation thereof; or under the name of "Shrine" or any colorable imitation thereof as the name of, or for, any society or organization, corporate or otherwise.

IV.

From using, wearing or displaying an insignia or emblems of membership of any society or organization, corporate or otherwise, any of the emblems, insignia, paraphernalia, badges, jewels or headcovering, etc., or any colorable imitation thereof, of the plaintiffs or plaintiff intervenor or plaintiffs intervenors or any of its Temples or subordinate organizations.

V.

From using as a part of any organization, corporate or otherwise, or in connection therewith the Constitution and By-laws of the plaintiffs and the plaintiff intervenor and plaintiffs intervenors, and of their Temples and subordinate organizations or any colorable imitation of the same or of any part thereof.

VI.

From using, wearing or displaying any of the emblems, insignia, paraphernalia, jewels, badges, head-coverings, constitution and laws, titles of officers or colorable imitation thereof of the plaintiffs or plaintiff intervenor or the other plaintiffs intervenors herein, as the emblems, insignia, paraphernalia, jewels, badges, head-covering, constitution and laws and titles of officers of any fraternal or secret order, or other organization or society by whatever name it may be called, and whether corporate or otherwise.

VII.

From using the name "Shrine" as the name of any fraternal or secret order or other organization or society by whatever name it may be called or otherwise known and whether corporate or otherwise.

VIII.

From using the name "Shriner" and the name "Noble" as a designation of the membership of any fraternal or secret order or other organization or society, by whatever name it may be called or known and whether corporate or otherwise.

a non-federal ground of decision having no fair support. *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 258, 261; *Ward* v. *Love County*, 253 U. S. 17, 22; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Railroad Commission* v. *Eastern Texas R. R. Co.*, 264 U. S. 79, 86; *New York Central R. R. Co.* v. *New York & Pennsylvania Company*, 270 U. S. 124, 126.

The record and the opinions set forth therein make it apparent that the existence within the State of Texas of local lodges of each of the two orders was not contrary to any statute of the State. The state court put its decision upon principles of general law which it deemed applicable, and not upon any local regulations. It did not wholly refuse to recognize the right set up by the negro order in virtue of the incorporation under the act of Congress, but did hold that the white order had acquired a superior and exclusive right to use the name, constitution, emblems and regalia in question by prior adoption and use; that the subsequent adoption and use by the negro order was in derogation of that right; that the white order, in the absence of acquiescence or laches on its part, was entitled to an injunction preventing further use by the negro order; and that there had been no such acquiescence or laches as would constitute a bar to that relief, inasmuch as the negro order had been proceeding with "a fraudulent purpose of appropriating the benefits of the [white] order to themselves."

Whether the rules relating to the use of trade-marks and trade-names are applicable to controversies like this between fraternal orders has been the subject of varying decisions in other courts. Without now indicating any opinion on that question, we shall indulge the assumption that the state court was right in holding those rules applicable and shall pass to another matter turning on the facts of this case, and which as resolved by the state court resulted in the denial of the federal right set up by the negro order. That matter is whether there was acquiescence or laches on the part of the white order. The state court held there was neither. If there was either the white order was without any right to object to the use which it was seeking to restrain and the negro order was entitled to continue that use in virtue of its incorporation under the Act of Congress.

An attentive examination of the record discloses not only that the finding on the question of laches is without fair support in the evidence, but that the evidence conclusively refutes it.

There is no evidence of a fraudulent intent on the part of the negro order, or of a purpose on its part to induce any one, whether mason or non-mason, to believe that it was the white order or that they were parts of the same fraternity. On the contrary, it is shown that the negro order always held itself out as entirely distinct from the white order and as open only to members of the negro masonic fraternity. True, there was much imitation, but this is shown to have been in the nature of emulation rather than false pretense.

The evidence discloses that the negro order promptly entered its constitution in the Congressional Library under an act of Congress providing for copyrights; that its members openly wore its insignia as indicative of its existence and their membership; and that at its yearly national meetings the members in large numbers marched in public parades wearing its regalia.

It is further shown that the Imperial Potentate of the white order in his address at their national meeting in 1894 called attention to the existence of the negro order and to its use of names, titles, etc., like those of the white order. He also named Texas as one of the States in which the negro order had established lodges. The address was published and distributed among the lodges and members of the white order. At several subsequent meetings there was similar mention of the negro order and its activities.

Thus it is established that from the beginning the white order had knowledge of the existence and imitative acts and practices of the negro order. In addition, the evidence indubitably shows that with such knowledge the white order silently stood by for many years while the negro order was continuing its imitative acts and practices and was establishing new lodges, enlarging its membership, acquiring real property in its corporate name, and investing substantial sums in the copied paraphernalia, regalia and emblems. It also is shown by the uncontradicted testimony of several witnesses—one a life member of the white order—that a large proportion of the copied paraphernalia, regalia, emblems and insignia used by the negro order, its lodges and members was purchased from or through members of the white order, and that in one instance a lodge of that order, preparatory to moving to new quarters, sold the paraphernalia and regalia used in the old quarters to a lodge of the negro order in the same city.

The effect on the negro order of the silence and apparent acquiescence of the white order is reflected in the fact that when this suit was brought the former had 76 local lodges, approximately 9,000 members and real and personal property valued at approximately $600,000 which was held and used for fraternal and charitable purposes.

The only evidence making against that already outlined consists of a showing that a suit was instituted in Georgia in 1914 by a local lodge of the white order against a local lodge of the negro order to restrain the latter from imitating the name, emblems and regalia of the former and that a similar suit was begun in Arkansas a few years later—one resulting in a decree for the plaintiffs and the other in a decree for the defendants. In instituting these suits the plaintiff lodges undoubtedly manifested strong objections to the imitative acts of the defendant lodges. But the objections came too late to overcome or weaken the force of the conduct of the white order during the 30 years preceding the earlier of the two suits. After that period of inaction and seeming acquiescence it was too late to resuscitate the original exclusive right for which the white order is now contending. *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 5, 19, 37.

What we have said of the evidence demonstrates, as we think, not only that there was obvious and long continued laches on the part of the white order, but also that the circumstances were such that its laches barred it from asserting an exclusive right, or seeking equitable relief, as against the negro order. *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261-263; *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 35-37; *Piatt* v. *Vattier*, 9 Pet. 405, 416; *Hayward* v. *National Bank*, 96 U. S. 611, 617; *French Republic* v. *Saratoga Vichy Co.*, 191 U. S. 427, 436-437; *Benedict* v. *City of New York*, 250 U. S. 321, 328; *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 430, 446.

As it is apparent that had this view of the question of laches prevailed in the state court the federal right set up by the negro order must have been sustained, the decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

END

OF

CASE